Supreme Court, U.S.
FILED

941838 MAY 8 1995

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OXY USA INC.,

Petitioner,

v.

CONTINENTAL TREND RESOURCES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal judicial review of a punitive damage award comports with the Due Process Clauses of the United States Constitution and standards for review of federal jury verdicts if the reviewing court will disturb the jury's verdict only if it "shocks the judicial conscience" and where the reviewing court refuses to evaluate the award in the context of punishments in comparable cases.

2. Whether a $30,000,000 punitive damage award is excessive under the Due Process Clauses of the United States Constitution where it is manifestly predicated primarily on the financial condition of the defendant and is not justified on the basis of objective factors approved by this Court.

3. Whether a $30,000,000 punitive damage award, which is more than 100 times greater than respondent's compensatory damages, is so excessive as to violate the Due Process Clauses of the United States Constitution.

LIST OF PARTIES

In the proceeding before the court of appeals, the parties were Continental Trend Resources, Inc.; Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright; Cindy Wright; Jeffrey B. Hume; Farrar Oil Company; OXY USA Inc.;* and Williams Natural Gas Company.

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* The parent companies of OXY USA Inc. are Occidental Oil and Gas Corporation, Occidental Petroleum Investment Company, and Occidental Petroleum Corporation. OXY USA Inc. owns minority interests in Canadian Occidental Petroleum, Ltd. and East Texas Salt Water Disposal Company. All other companies in which OXY USA Inc. owns an interest are wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner OXY USA Inc. ("OXY") respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appealfor the Tenth Circuit affirming a $30,000,000 district court punitive damage award for alleged tortious interference with contractual relations.[1]

The judgment below is the largest punitive damage award ever approved by a federal appellate court. It reflects an accelerating trend towards larger and larger civil justice system punishments that are vastly disproportionate to actual injuries and far greater than required to fulfill the objectives of punishment and deterrence. It also reflects a federal judiciary that is both divided and confused as to the appropriate standards and methods for assessing and reviewing punitive damage awards. Review by this Court is essential if lower federal courts are to administer common law punishments consistently and within federal constitutional constraints.

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[1] This Court has granted certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, which presents questions similar to those presented by this petition. Indeed, the Court's resolution of Question 2 presented in BMW's petition would undoubtedly influence the correct resolution of Question 3 presented by OXY in this case. Under these circumstances, the Court would normally hold this petition for its decision in *BMW*, and that would appear to be an appropriate course to follow. At the same time, however, this case presents challenges to a $30,000,000 punitive damage award affirmed by a federal court of appeals, thereby necessarily raising these fundamental issues in a setting that implicates distinctive features of the exercise of federal judicial power. Thus, the Court may want to grant this petition and consider this case in tandem with *BMW*.

OPINIONS BELOW

The opinion of the court of appeals is reported at 44 F.3d 1465 and reprinted at App. 1a-29a. The court of appeals' unreported order denying the petition for rehearing and suggestion for rehearing in banc is reprinted at App. 30a-32a. The order of the district court denying petitioner's post-trial motions is reported at 810 F. Supp. 1520 and reprinted at App. 33a-63a. The unreported order of the district court granting in part and denying in part petitioner's motion for summary judgment is reprinted at App. 64a-81a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1337 & 1367. The court of appeals' jurisdiction was based on 28 U.S.C. § 1291. That court issued its final decision in this case on April 6, 1995, and this petition is being filed within 90 days of that date. This Court therefore has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clauses of the Fifth and Fourteenth Amendments, which are set out verbatim at App. 97a.

STATEMENT OF THE CASE

OXY seeks review of a decision of the United States Court of Appeals for the Tenth Circuit affirming a $30,000,000 punitive damage award. That judgment was the largest punitive damage award ever approved by a federal appellate court,[2] six times as large as the largest punitive damage award ever

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[2] A judgment including a larger punitive damage award was affirmed, in the absence of a challenge to the award itself or its amount, in *Teague* v. *Bakker*, 35 F.3d 978 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1107 (1995).

previously affirmed under Oklahoma law and 111 times the compensatory damages.

Statement of the Facts

This case arose from a commercial dispute "between sophisticated business entities," respondent, Continental Trend Resources, Inc. ("CTR"), and OXY. App. 54a. CTR operated approximately 140 natural gas wells in western Oklahoma. App. 3a. The wells were connected to the Rodman natural gas processing plant (the "Rodman Plant")[3] by a gathering system owned by Williams Natural Gas Company ("WNG") and operated by OXY. App. 3a-4a. OXY owned compressors and other facilities necessary for the operation of the Rodman gathering system. App. 4a. Under contracts between CTR and OXY, OXY transported CTR's gas to the Rodman Plant, where it was processed before being delivered to an interstate pipeline. *Id.*

In 1989, as part of a plan to sell its gas to buyers other than WNG and OXY, CTR asserted that its contracts with OXY had been terminated or breached, a contention that OXY rejected. App. 5a. CTR responded by filing several lawsuits in Oklahoma state court seeking damages and rescission of the contracts. *Id.* OXY counterclaimed for a declaration that the contracts remained valid and that CTR had breached them. *Id.*

While the Oklahoma cases were pending, CTR offered the gas covered by the contracts to third parties and asserted the right to transport the gas for such sales through the Rodman gathering system without compensation. *Id.* OXY refused to permit CTR to use the Rodman system for sales of gas to third parties, closed connections between twelve of CTR's wells and the Rodman system, and notified three potential buyers of CTR

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[3] OXY owned a 50% interest in the Rodman Plant. The other 50% was owned by ORYX Energy Company.

gas of the contractual dispute.[4] App. 5a, 14a. CTR itself shut in numerous other wells and made alternative arrangements to sell the gas to third parties without using the Rodman system. App. 73-74a, 78a. There were 13 other processing plants and 16 other pipelines in the area, and most of CTR's gas was flowing to other buyers within a few months. App. 73a.

CTR filed suit in the United States District Court for the Western District of Oklahoma, asserting antitrust claims against OXY and WNG, and alleging that OXY had tortiously interfered with its prospective sales of gas to third parties by refusing to permit CTR to use the Rodman gathering system and informing potential buyers of the CTR-OXY dispute. App. 5a. OXY counterclaimed for breach of contract. *Id.* Prior to trial, the district court granted OXY and WNG's motion for summary judgment on CTR's antitrust claims, denied CTR's motion for summary judgment on OXY's contract claims, and permitted the tortious interference claims to be tried to a jury. App. 64a-81a.

Decisions of the Courts Below

The jury returned a verdict for CTR on the tortious interference claims, rejected OXY's counterclaims, and awarded CTR $269,000 in compensatory damages and $30,000,000 in punitive damages. The trial court denied OXY's post-trial motions. App. 33a-62a.

In justifying the amount of the $30,000,000 punitive damage award, the district court emphasized the net worth of OXY and its parent and grandparent corporations, characterizing OXY as a "megacorporation," App. 63a, and stating that "Oxy is a subsidiary of a giant American corporation—OXY Oil and Gas USA, Inc." and that "Oxy's grandparent corporation, Occidental

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[4] Copies of OXY's letters to CTR's prospective customers may be found at App. 88a-96a.

Petroleum Corporation of Los Angeles is reputed to be one of the Top Ten oil companies in the nation." App. 56a.

The district court also rationalized the magnitude of the punitive damage award on the theory that OXY's conduct toward CTR "incrementally damages the United States in its present struggle to remain a global economic power." App. 51a.

OXY appealed to the Tenth Circuit, and CTR cross-appealed the summary judgment against it on its antitrust claim. The Tenth Circuit affirmed both the judgment entered on the jury verdict and the summary judgment. App. 1a-29a. The court held that the jury instruction on punitive damages and the trial court's review of the verdict were consistent with procedural due process and that the $30,000,000 punitive damages award did not "shock the judicial conscience" and was not grossly excessive in violation of substantive due process requirements. App. 10a-22a. The court observed that "[t]he jury apparently considered the wealth of the defendant, a large oil company with a parent company worth over a billion dollars, in determining the amount needed to punish and deter," App. 20a, and that "$30,000,000 is not necessarily a shocking figure" when "examined from the perspective of what is necessary to punish a very wealthy corporation, and to deter it and others similarly situated from like behavior." App. 21a.

The court denied OXY's Motion for Rehearing and Suggestion of Rehearing in Banc, although three judges of that court voted for rehearing in banc. App. 30a-32a.

REASONS FOR GRANTING THE WRIT

I. STATE AND FEDERAL COURTS ARE UNCERTAIN AS TO PROCEDURAL AND SUBSTANTIVE STANDARDS GOVERNING THE ASSESSMENT AND REVIEW OF PUNITIVE DAMAGES AND ARE RENDERING INCONSISTENT AND CONFUSING DECISIONS

Punitive damages are fines levied by civil juries, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974), and "pose an acute danger of arbitrary deprivation of property," *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2340 (1994). This case highlights a punitive damages problem of overriding national importance: trial and appellate courts are deeply divided regarding the standards to apply in determining whether such awards are so grossly excessive as to violate the Due Process Clauses of the Fifth and Fourteenth Amendments.

Justices of this Court have identified several features of punitive damage awards that heighten the likelihood of arbitrary state-imposed punishments:

- Punitive damages are quasi-criminal in nature but are not imposed with any of the safeguards of criminal penalties. *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting).

- The amount of the punitive damages penalty is completely indeterminate and not subject to legislatively established maximum penalties. *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

- Punitive damages are imposed by juries impaneled to act as decisionmakers in a single case with no broader

experience of comparable circumstances. *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring).

- Punitive damages have the potential to be used to punish unpopular defendants. *Gertz*, 418 U.S. at 350; *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 50 n.14 (1979).

- Jurors imposing punitive damages have no information about criminal fines for comparable conduct or the range of punitive damages in similar cases. *Haslip*, 499 U.S. at 48 (O'Connor, J., dissenting).

Despite these and other concerns that have been articulated regarding the arbitrary and capricious qualities of punitive damage regimes, both the size of punitive damage awards and their frequency have been increasing sharply. *See Haslip*, 499 U.S. at 18 ("We note once again our concern about punitive damages that 'run wild.'"); *id.* at 61 (O'Connor, J., dissenting) ("Recent years . . . have witnessed an explosion in the frequency and size of punitive damage awards."); *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing.").

In one state, Alabama, aggregate punitive damage awards affirmed on appeal grew from approximately $400,000 during a five-year period in the mid 1970's to approximately $89,000,000 during a comparable interval 15 years later. *See* Brief *Amici Curiae* of Life Ins. Co. of Ga., et al., at 15-16, in *BMW of North America, Inc.* v. *Gore*, No. 94-896. In another state, Texas, aggregate punitive damages affirmed on appeal in business cases grew from $85,000 during a four-year period in the late 1960's to $127,591,000 during a comparable period in the late 1980's. *See id.* at 18.

In response to the punitive damages phenomenon, this Court has rendered three decisions in the past four years in an effort to ensure that punitive damage awards comport with the Due Process Clause's restrictions on arbitrary punishments. In

Pacific Mutual Life Insurance Co. v. *Haslip*, 499 U.S. 1 (1991), the Court held that punitive damage awards are subject to review under the Due Process Clause and that there is a substantive due process limit on the amount of punitive damage awards, but declined to articulate any mathematical test for determining when an award is excessive. In *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993), the Court reiterated that "the Fourteenth Amendment imposes substantive limits" on the size of a punitive damage award, but upheld the punitive damage award against TXO based upon the facts of that case without providing specific guidance as to the contours of those limits. One year later, in *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331 (1994), the Court held that judicial review for excessiveness of a jury's punitive damage verdict was a procedural requirement of the Due Process Clause. The *Honda* Court acknowledged that it had still not yet had an opportunity to shape "the character of the standard that will identify unconstitutionally excessive awards." *Id.* at 2335. This case presents the Court with a suitable vehicle to do so.

Prior to *Haslip*, many federal and state courts had reviewed punitive damage awards for excessiveness under a highly deferential "shock-the-judicial-conscience" standard. *Haslip* cast doubt on the constitutionality of that amorphous test and implied that the Constitution requires more "objective" standards. *See* 499 U.S. at 21 n.10. For a short time, that suggestion seemed to have had an impact, at least in federal courts, in reducing the size of punitive damage awards.[5] As predicted by Justice Scalia,

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[5] In the period between *Haslip* and *TXO*, federal appellate courts in at least four different circuits reviewed punitive damages awards and found them to be grossly excessive. *King* v. *Macri*, 993 F.2d 294 (2d Cir. 1993) (reducing punitive damages award from $250,000 to $150,000); *Vasbinder* v. *Scott*, 976 F.2d 118 (2d Cir. 1992) (reducing punitive damages awards from $300,000 to $50,000); *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc) (reducing punitive damages award from $2 million to $1 million), *modified in part*, 13 F.3d 58 (3d Cir.) (en banc), *cert. denied*, 114 S. Ct. 650 (1993); *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992) (finding $1 million punitive

however, the plurality opinion in *TXO* was apparently interpreted by many courts as immunizing punitive damage awards from any meaningful review for excessiveness. *See TXO*, 113 S. Ct. at 2727 (Scalia, J., joned by Thomas, J., concurring) ("[T]he great majority of due process challenges to punitive damage awards can henceforth be disposed of simply with the observation that 'this is no worse than *TXO*.'"). Thus, while federal appellate courts reduced punitive damage awards of $1 million or more against corporate defendants in at least ten cases on grounds of excessiveness during the five-year period immediately prior to *TXO*,[6] in the two years since *TXO*, only one punitive damage award against a corporate defendant has been reduced by *any* federal appellate court on the ground of

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damages award excessive); *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (reducing punitive damages award from $25 million to $12.5 million), *cert. denied*, 112 S. Ct. 1941 (1992).

[6] *Auster Oil & Gas, Inc.* v. *Stream*, 835 F.2d 597 (5th Cir.) (ordering new trial because of excessiveness of $5 million punitive damages award), *cert. dismissed*, 486 U.S. 1027, *cert. denied*, 488 U.S. 848 (1988); *Getty Petroleum Corp.* v. *Island Transportation Corp.*, 862 F.2d 10 (2d Cir. 1988) (reducing punitive damages award from $1 million to $250,000), *cert. denied*, 490 U.S. 1006 (1989); *DeRance, Inc.* v. *PaineWebber, Inc.*, 872 F.2d 1312 (7th Cir. 1989) ($20 million punitive damages award found excessive); *Vance* v. *Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (ordering new trial because $2.5 million punitive damages award found excessive); *Simon* v. *Shearson Lehman Bros.*, 895 F.2d 1304 (11th Cir. 1990) (reducing punitive damages award from $8 million to $1 million); *Kelley* v. *Sears, Roebuck & Co.*, 882 F.2d 453 (10th Cir. 1989) (new trial because punitive damages award of $1.25 million found to be based on passion and prejudice); *The Post Office* v. *Portec, Inc.*, 913 F.2d 802 (10th Cir. 1990) (reducing punitive damages award from $1.5 million to $500,000), *cert. granted, judgment vacated, case remanded*, 499 U.S. 915, *opinion vacated as moot*, 935 F.2d 1105 (10th Cir. 1991); *Dunn*, 1 F.3d 1371; *Zazu*, 997 F.2d 499; *Mason*, 948 F.2d 1546.

excessiveness.[7] And several awards reduced on review by federal district courts were reinstated by courts of appeals.[8]

The effect of *TXO*, therefore, has been to discourage courts, including federal trial and appellate courts, from exercising any meaningful constitutional and non-constitutional review over excessive punitive damage awards, eliminating for all intents and purposes federal appellate reduction of such awards. Federal appellate review of punitive damage awards for excessiveness, a procedure "traditionally accorded at common law," *Honda*, 114 S. Ct. at 2342 (Scalia, J., joined by Thomas, J., concurring), is approaching extinction as a result of *TXO*.

The abandonment of effective appellate scrutiny of punitive damage awards has been accompanied by a further acceleration in the size and incidence of huge punitive damage awards. *See, e.g.*, Petition for Certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, at 26-29; Brief *Amici Curiae* of Life Ins. Co. of Ga., et al., in *BMW of North America, Inc.* v. *Gore*, No. 94-896, at 14-21, App. A-C. Punitive damage awards in federal courts have burst to new heights, as reflected in punitive damage verdicts of $5 billion (recently upheld by the trial court), *In re Exxon Valdez* (D. Alaska, No. A89-095 CV), $1.2 billion, *In re Estate of Marcos Human Rights Litigation* (D. Hawaii MDL No.

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[7] *See Imagineering, Inc.* v. *Van Klassens, Inc.*, 1995 WL 240703 (Fed. Cir. Apr. 24, 1995) (remanding a $4 million punitive damage award to the district court). Several weeks after *TXO*, the Third Circuit, en banc, affirmed a panel decision reducing a punitive damages award. *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir. 1993) (en banc), *modified in part*, 13 F.2d 58 (3rd Cir.) (en banc), *cert. denied*, 114 S. Ct. 650 (1993).

[8] *See, e.g., Tudor Associates, Ltd.* v. *AJ & AJ Servicing, Inc.*, 1994 WL 510456 (4th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3629 (U.S. Feb. 15, 1995) (No. 94-1380); *Jacobs Mfg. Co.* v. *Sam Brown Co.*, 19 F.3d 1259 (8th Cir.), *cert. denied*, 115 S. Ct. 487 (1994) *and* 115 S. Ct. 1251 (1995).

840), and many more in the multi-million dollar range.[9] As Justice O'Connor stated in *TXO*, "the upward trajectory continues unabated." 113 S. Ct. at 2742 (O'Connor, J., dissenting, joined by White, J., and Souter, J., in part).

The need for intervention by this Court is clear. The Court has now recognized substantive due process as a limiting principle in *Haslip* and *TXO* and established a clear procedural right to excessiveness review in *Honda*. But the courts below are in disarray as to how to conduct this constitutionally required review and have no common understanding of the standards to apply in conducting that review. Indeed, after *TXO*, neither the process nor the substance of the judicial review has any significant, consistent or predictable meaning, or yields results that can be characterized as anything other than capricious.

This case offers an important opportunity for the Court to articulate the constitutional standards for judicial review of punitive damage awards because this case differs in material respects from *TXO*, thus providing the Court an opportunity to contrast the elements cited as justification for the $10,000,000 punitive damages award in *TXO* with characteristics that render the $30,000,000 award in this case constitutionally excessive. Indeed, the award in this case is patently excessive and cannot be upheld if substantive due process limits on punitive damages are to have *any* meaning.

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[9] *See, e.g., Chemstar, Inc.* v. *Liberty Mutual Ins. Co*, 1994 WL 650018 (9th Cir. 1994) ($14 million), *petition for cert. filed*, 63 U.S.L.W. 3599 (U.S. Feb. 6, 1995) (No. 94-1337); *Hopkins* v. *Dow Corning Corp.*, 33 F.3d 1116, 1126-28 (9th Cir. 1994) ($6.5 million), *cert. denied*, 115 S. Ct. 734 (1995); *Fenstermacher* v. *Telelect, Inc.*, 1994 WL 118046 (10th Cir.) ($3.75 million), *cert. denied*, 115 S. Ct. 200 (1994); *Roboserve, Inc.* v. *Kato Kagaku Co.*, 873 F. Supp. 1124, 1142-43 (N.D. Ill. 1995) ($6 million).

II. FEDERAL APPELLATE COURTS ARE IN CONFLICT CONCERNING THE STANDARDS TO APPLY IN REVIEWING PUNITIVE DAMAGE AWARDS FOR EXCESSIVENESS

This case presents compelling reasons for this Court to consider an important issue that has divided the federal courts of appeals: what are the appropriate constitutional excessiveness standards to be applied by federal courts reviewing punitive damage awards in cases decided under state law? This Court has had no previous occasion to address this issue, and will have no reason to do so in *BMW*, because its previous cases involved *state* court jury verdicts. *See BMW of North America, Inc.* v. *Gore*, No. 94-896 (Alabama); *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331 (1994) (Oregon); *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (West Virginia); *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991) (Alabama).

The imposition of punitive damages in a federal action decided under state law[10] raises unique concerns that do not arise in state court punitive damage litigation. In contrast to state court punitive damage litigation, difficult questions arise in federal court punitive damage actions decided under state law because of the necessary balancing of the respective interests of two sovereigns and the interplay between state and federal law. In addition, federal judicial review of punitive damage verdicts generally (regardless whether the underlying claim is based on state or federal law) involves issues under Rules 50 and 59 of the Federal Rules of Civil Procedure and the Seventh Amendment that are not relevant to state court review of punitive damage verdicts.

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[10] In this case, after dismissing all federal law claims on summary judgment, the district court retained supplemental jurisdiction over the state law claims. 28 U.S.C. § 1367.

Federal courts of appeals have attempted to articulate the standards for review of punitive damages in federal court cases applying state law and have reached conflicting conclusions. The Tenth Circuit standard, applied below, allows a jury's punitive damage verdict to be reduced only if it is "so excessive as to shock the judicial conscience." App. 18a (quotation omitted). As the *Haslip* Court recognized, this scope of review is as deferential as the "manifestly and grossly excessive" standard that *Haslip* suggested would *not* satisfy due process. *See Haslip*, 499 U.S. at 21 n.10 (quotation omitted). The Tenth Circuit acknowledged the *Haslip* Court's concerns, but determined nevertheless that its "shock the judicial conscience" standard "satisfies constitutional standards because in determining whether the award meets the excessiveness standard, we also consider the state's substantive factors." App. 18a-19a. The Tenth Circuit, however, rejected OXY's argument that one of the factors that should be included in the reviewing court's calculus is a comparision of the award with awards in similar cases, an aspect of judicial review that the *Haslip* Court had approved. The court below brushed aside that suggestion, stating that a comparative analysis would "exceed our scope of review." App. 20a.

On the other hand, the Ninth Circuit in *Morgan* v. *Woessner*, 997 F.2d 1244, 1258 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994), articulated a standard of review that *requires* a federal court reviewing a punitive damage award arising from a state law claim not only to consider whether "the award is within the confines set by state law," *id.* at 1259, but also to apply *federal* standards that more closely track this Court's analysis in *Haslip* and "adopt a three-stage approach similar to Alabama's," *id.* at 1256. Under the standard set forth in *Morgan*, the district court and the court of appeals "can look to" the factors applied by the Supreme Court of Alabama in *Haslip* "or other general elements of reasonableness to determine whether a punitive damage award should be upheld." *Id.* at 1257. Like the system approved in *Haslip*, this approach *requires* the district court, among other things, to "look to awards in similar cases." *Id.*

The Third Circuit's standard of review is also inconsistent with the Tenth Circuit's approach. In *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir.), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993), the Third Circuit fashioned a federal standard that "take[s] into consideration all the factors listed in comment e to Restatement of Torts (Second) § 908," including "the awards of punitive damages in similar cases." *Id.* at 1391.[11] Based upon its *de novo* review of punitive damage awards in similar cases, the Third Circuit determined that the $2 million remitted punitive damages award imposed by the district court (after the jury returned a $25 million punitive damages verdict) "greatly exceeds the level of punitive damages awarded in other similar asbestos cases," and that "the maximum amount of punitive damages that could reasonably have been awarded . . . [was] $1 million." *Id.*

The Seventh Circuit is also in conflict with the Tenth Circuit, having held that "[a]mong the factors this court looks at in determining whether to set aside or adjust an award is 'whether the award is out of line compared to other awards in similar cases.'" *DeRance, Inc.* v. *PaineWebber, Inc.*, 872 F.2d 1312, 1329 (7th Cir. 1989) (citation omitted). In remitting a $20 million punitive damage award to $7 million, the Seventh Circuit observed that the defendant "deserve[d] to be punished, but when contrasted to punitive damages awards in analogous settings, the $20 million punitive damages award . . . is significantly excessive." *Id.*

The Fourth Circuit follows yet another approach, having concluded that federal courts cannot, consistent with the Seventh Amendment and Rules 50 and 59 of the Federal Rules of Civil Procedure, engage in "[a] *Haslip*-type post-trial review, insofar as it is . . . *quasi* de novo" because it would amount to

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[11] The Third Circuit further "recommend[ed] that in the future district courts explicitly assess the amount of a punitive damages award" in accordance with the Restatement factors. *Dunn*, 1 F.3d at 1382 n.15.

substituting the court's "judgment for that of the jury." *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 99, 108-10 (4th Cir. 1991).[12] Thus, the Fourth Circuit has determined that federal juries in diversity cases must be given extremely detailed instructions regarding the appropriate level of punishment to make up for the absence of adequate judicial review.[13] *See Johnson* v. *Hugo's Skateway*, 974 F.2d 1408, 1416 (4th Cir. 1992) (en banc). Although the Fourth Circuit approach differs significantly from that of the Tenth Circuit in this case, the ultimate results in those two circuits are similar and are directly contrary to the holdings of the Third, Seventh and Ninth Circuits. In two circuits, therefore, federal courts have no authority to review the excessiveness of a punitive damages award through comparative analysis with awards in similar cases, and in three circuits they do.[14]

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[12] The circuits are in sharp conflict regarding whether federal courts sitting in diversity may engage in *de novo* review of punitive damage awards or instead are limited, as suggested in *Browning-Ferris*, by federal standards of post-verdict review set forth in Fed. R. Civ. P. 50 and 59, as well as the Seventh Amendment right to a jury trial. *Compare Mattison*, 947 F.2d at 99, 108-10 (engaging in limited review pursuant to *Browning-Ferris*) *with Morgan*, 997 F.2d at 1255 n.8, 1256-58 (announcing that "it is *Haslip*, not *Browning-Ferris Industries*, that provides the guidance in this volatile area" and adopting *Haslip*-type post-verdict review process); *Dunn*, 1 F.3d at 1381-82, 1390-91 (explicitly rejecting Fourth Circuit's position in *Mattison* and developing new, more searching standards of appellate review in light of *Haslip* that require, among other things, a comparative analysis with similar awards).

[13] In *Honda*, this Court rejected an argument that the highly detailed jury instructions required by Oregon law satisfied due process concerns absent judicial review of awards for excessiveness. *Honda*, 114 S. Ct. at 2341.

[14] The Tenth Circuit's approach in this case not only conflicts with cases from other circuits, but also is inconsistent with the reasoning of earlier Tenth Circuit decisions. For example, in *The Post Office* v. *Portec, Inc.*, 913 F.2d 802 (10th Cir. 1990), *cert. granted and judgment vacated*, 499 U.S. 915, *opinion vacated as moot*, 935 F.2d 1105 (10th Cir. 1991), the Tenth Circuit, reviewing a punitive damage award in a case of business fraud, observed,

One of the strongest justifications for the judicial review of punitive damage awards mandated by *Honda* is that a judge's experience evaluating, and access to information concerning, a wide variety of cases provides a broader and much sounder perspective than a jury impaneled for a single case can possibly have. *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring). Without reference to the levels of punishment ordinarily prescribed for ranges of conduct, it is impossible to determine what punishment is appropriate and what punishment is excessive. *See Id.* at 48 (O'Connor, J., dissenting). To reject the very process of review necessary to ensure some modicum of consistency, is to permit the very arbitrariness that *Honda* sought to avoid by requiring judicial review. Thus, not only has this Court specifically approved use of "a comparative analysis" by appellate courts in reviewing punitive damage awards to determine if the award is in line with awards in similar cases, *Haslip*, 499 U.S. at 20-21, such review is implicit in the process of review that *Honda* held to be constitutionally required.[15]

The reasoning of the *TXO* three-Justice plurality is not inconsistent with the need for a comparability analysis by a court reviewing a punitive damage award. In *TXO*, the plurality

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"[w]e do not in any way condone defendant's activities in this case. We simply point out that there are more reprehensible acts that more easily justify large punitive damages awards." 913 F.2d at 810. In *Malandris* v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981) (en banc), *cert. denied*, 464 U.S. 824 (1983), the Tenth Circuit relied upon awards in similar cases to cut a punitive damages award by two-thirds notwithstanding its findings that the defendant had committed fraud and that its actions could be found to be "outrageous."

[15] Indeed, in one of the treatises cited by the *Honda* Court in support of its reasoning, the authors observe that one of the "factors affecting the amount which may be awarded as exemplary or punitive damages" is "the amount allowed as punishment in similar cases." Draper, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 A.L.R. 5th 195, 289 (1993). *See Honda*, 114 S. Ct. at 2338 (citing this treatise).

declined to make comparative review a stand-alone test for determining excessiveness. *TXO*, 113 S. Ct. at 2719. The plurality, however, was careful to state that "we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations." *Id.* at 2720. The Tenth Circuit's approach—arbitrarily ignoring the results in all prior cases and reviewing every case in a vacuum—*does* rule out this possibility.

Moreover, even if a comparative analysis in this case were not required under the Due Process Clause, the failure of the district court to apply a comparative analysis in the consideration of OXY's motion for new trial or remittitur under Rule 59 of the Federal Rules of Civil Procedure constitutes a clear abuse of discretion which the Tenth Circuit refused to correct. The standard to be applied by a federal court in considering a motion for a new trial is a federal standard; the fact that a state court might or might not apply a comparative analysis is immaterial. In other contexts, federal courts of appeals have held that it is an abuse of discretion not to consider a comparative analysis in dealing with Rule 59 motions for remittitur of damage awards.[16]

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[16] Many federal courts of appeals have long recognized that comparative analysis is an appropriate component of federal judicial review of jury verdicts assessing compensatory damages. *See, e.g., Debiasio* v. *Illinois Central R.R.*, No. 94-3000, 1995 WL 217414, at *8 (7th Cir. Apr. 13, 1995) ("'[T]he trial court may take into account whether the award is out of line when compared to other awards in similar cases.'") (quoting *Holmes* v. *Elgin, Joliet & Eastern Ry.*, 18 F.3d 1393, 1396 (7th Cir. 1994)); *Marcel* v. *Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994) ("We review a claim of excessiveness by comparing the awards at issue with rulings in other factually similar cases decided under controlling law, here Louisiana law."); *Raucci* v. *Town of Rotterdam*, 902 F.2d 1050, 1058 (2d Cir. 1990) ("To determine whether an award of damages is shockingly excessive when the law of a particular state is applied, we must examine and compare the challenged award with awards made in similar cases in the courts of that state."); *In* re *Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1156-57 (5th Cir. 1985) (applying comparative analysis to

A comparability analysis would almost certainly affect the outcome of this case. The punitive damage awards in every Oklahoma case, even those involving fraud, have been far lower than the award in this case, and in many instances were reduced still further by appellate courts. For example, in *Timmons* v. *Royal Globe Insurance Co.*, 653 P.2d 907 (Okla. 1982), the defendant insurance company was punished for "falsifying a sworn statement, surreptitiously obtaining confidential government records, actual deceit by misrepresentation of identity, and a successful attempt to gain advantage over an insured by discouraging legal representation in a legal controversy." *Id.* The Supreme Court of Oklahoma reduced the jury's $3 million punitive damages award to $1.5 million.[17]

Moreover, the Tenth Circuit has reduced punitive damage awards in numerous cases, and has even done so in cases involving egregious conduct and death or severe physical injury. *See, e.g., Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (punitive damages reduced from $25 million to $12.5

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reduce a compensatory award) *and Martell* v. *Boardwalk Enters., Inc.*, 748 F.2d 740, 750 (2d Cir. 1984) (same). *But see Herold* v. *Burlington Northern, Inc.*, 761 F.2d 1241, 1248 (8th Cir.) (rejecting use of comparative analysis in reviewing compensatory awards), *cert. denied*, 474 U.S. 888 (1985). There is no principled reason why the standard used by federal courts to review compensatory awards should not be applied in the punitive damages context as well.

[17] *See also Buzzard* v. *Farmers Ins. Co.*, 824 P.2d 1105 (Okla. 1991) (bad faith failure to pay insurance proceeds, remittitur from $2,000,000 to $400,000); *Chandler* v. *Denton*, 741 P.2d 855 (Okla. 1987) (remittitur from $500,000 to $250,000); *American Nat'l Bank & Trust Co.* v. *BIC Corp.*, 880 P.2d 420 (Okla. Ct. App. 1994) (punitive damages reduced from $11.1 million to $3 million in spite of conduct causing severe burns to three children).

million despite conduct causing death of plaintiff's husband), *cert. denied*, 112 S. Ct. 1941 (1992).[18]

Thus, a comparative analysis would have demonstrated that a $30,000,000 punitive award—more than twice as large as the largest punitive damages award ever approved by the Tenth Circuit and six times larger than the largest punitive damage award ever affirmed under Oklahoma law—was arbitrary, excessive and must be reduced. The Tenth Circuit's decision simply to ignore the level of punitive damage awards in other cases removes one of the "few clear guideposts in an area so painfully bereft of objective criteria." *TXO*, 113 S. Ct. at 2733 (O'Connor, J., dissenting).

This Court should grant certiorari to resolve the confusion as to whether comparative analysis is necessary and proper for federal courts reviewing punitive damage awards for excessiveness and, more generally, to clarify the requirements for judicial review of punitive damages by federal courts in diversity cases and other cases involving state law claims.

III. THE COURT SHOULD CLARIFY THE EXTENT TO WHICH PUNITIVE DAMAGES MAY BE PREDICATED ON THE DEFENDANT'S FINANCIAL CONDITION

The $30,000,000 punitive damage award in this case is a textbook example of punishment against a large corporate enterprise exclusively because of its financial condition.

This Court understands that "[p]unitive damages pose an acute danger of arbitrary deprivation of property" because "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a

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[18] The charts in Appendix J, 98a-99a, graphically illustrate how disproportionate this award is to other awards in the Tenth Circuit and decided under Oklahoma law.

defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda*, 114 S. Ct. at 2340-41. To assist in guarding against these dangers, the common law has traditionally provided for judicial review of punitive damage awards, and in *Honda* this Court held that such review is required by due process. *Id.* at 2341.

Judicial review is therefore a vital "procedural safeguard[]" against jury bias based upon a corporate defendant's net worth. *Id.* Nevertheless, although this Court has recognized that "emphasis on the wealth of the wrongdoer" may "increase[] the risk that the award may have been influenced by prejudice against large corporations," *TXO*, 113 S. Ct. at 2723, and has cautioned against jury verdicts based on little more than whether the defendant has a deep pocket, *Haslip*, 499 U.S. at 22, the Court has never squarely addressed the extent to which a corporate defendant's financial status may serve as the sole or primary justification for a large punitive damage award. This case presents the opportunity for the Court to address that issue.

In *TXO*, four Justices indicated that a corporate defendant's net worth, standing alone, is not a sufficient predicate for a large punitive damage award.[19] In *Honda*, the Court repeated the concern that "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and

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[19] *TXO*, 113 S. Ct. at 2739 (O'Connor, J., dissenting, joined by White & Souter, JJ.) ("Given the absence of another plausible explanation for this monumentally large punitive damages award, I believe it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources."); *id.* at 2725-26 (Kennedy, J., concurring in part and concurring in the judgment) (noting that Justice O'Connor made a "a plausible argument . . . that the size of the punitive award" in that case "is explained by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant," but concurring in the Court's judgment affirming the punitive damages award because that "[t]here is . . . another explanation for the jury verdict").

potentially biased juries." 114 S. Ct. at 2340. As noted above, those concerns come vividly to life in this case because the $30,000,000 penalty is manifestly the result of the jury's reaction, stimulated by plaintiff's counsel, to the defendant's net worth and earnings. None of the other factors drawn from Oklahoma law by the court below to sustain the award may objectively be seen as supporting an award of this magnitude. It can only be explained as punishment based upon OXY's financial status.

A. The Size Of The Award Cannot Be Justified Based On The Severity Of The Offense

Haslip held that appellate review of punitive damage awards should ensure that such awards are not "grossly out of proportion to the severity of the offense." *Haslip*, 499 U.S. at 22. Evaluation of the "severity" of the conduct, however, must occur within the framework of an understanding that all defendants in punitive damages cases have been adjudicated to be wrongdoers. "What we are concerned with is the possibility that a *guilty* defendant may be unjustly punished . . . ." *Honda*, 114 S. Ct. at 2339 (emphasis added). Thus, excessiveness review cannot consist merely of determining that a defendant was guilty of misconduct; inquiry into the excessiveness of the award must begin, not end, at that point.

In this case, no rational relationship exists between OXY's degree of culpability and the amount of the award. This case is a commercial dispute between sophisticated corporate parties concerning the interpretation and validity of contracts. The specific conduct for which OXY was held liable below consisted of its refusal to permit CTR to ship gas through the Rodman gathering system without paying for that service, and OXY's communications to third parties describing the dispute between it and CTR. While that conduct was labeled oppressive by the jury, and may suffice to warrant an award of punitive damages, it does not justify a $30,000,000 punishment for a $269,000

injury.[20] *Cf. Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 206-07 (1st Cir. 1987) (finding Anheuser-Busch's conduct to be "worthy of some outrage" but reducing $3 million punitive damage award to $300,000, stating, "we strongly question . . . whether Anheuser-Busch's conduct warranted $3 million of outrage").

A comparison with *TXO* is revealing. TXO filed a claim that this Court found was "part of a larger pattern of fraud, trickery and deceit." 113 S. Ct. at 2722. By contrast, OXY's claims were based on an assertion of rights under contracts that were still the subject of ongoing state court litigation. Had OXY's position on the validity of its contracts been upheld, its conduct could not have been tortious. Indeed, as noted above, OXY's contract claims were sufficiently meritorious to survive motions for summary judgment and for directed verdict and were presented to the jury. App. 84a-85a. As the trial court explained, "[t]here is evidence . . . from which the Jury could find performance . . . sufficient to permit their returning a finding [for OXY]." App. 84a. In sum, OXY presented colorable disputes over contract-based claims to judicial institutions for peaceful adjudication—not the type of conduct that courts should punish with $30,000,000 fines.

Moreover, punitive damages in this case were awarded in substantial part on the basis of a claim of interference with *prospective* contractual relations—a tort never before recognized under Oklahoma law. App. 7a-8a.[21] Given the substantially

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[20] OXY's letters, App. 88a-96a, on which the tortious interference claim was predicated, transmitted copies of its contracts with CTR and described OXY's version of its legal position vis-à-vis CTR—a position that the district found to be sufficiently meritorious to be submitted to the jury.

[21] Some other jurisdictions also have not recognized this tort. *See Junior Money Bags, Ltd.* v. *Segal*, 970 F.2d 1, 10-11 (5th Cir. 1992) (Louisiana); *Quality Auto Parts Co.* v. *Bluff City Buick Co.*, 876 S.W.2d 818, 823 (Tenn. 1994).

unsettled state of the law, OXY could not have been on notice that its conduct was tortious, much less that such conduct could be deemed so culpable as to justify a punitive damages award six times larger than any other award in Oklahoma history.

In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court stated that retroactive imposition of punitive damages arising from a new common-law cause of action would "raise important [constitutional] issues which, in an appropriate setting, must be resolved." *Id.* at 828-29. The Court underscored this same concern last Term, stating that "[t]he very labels give 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1505 (1994) ("Court would 'hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness.'") (citing *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *see also Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 489 (1915) (imposition of punitive damages based upon new judicial construction of a state statute violated due process where "[t]here had been no decision in the state holding or indicating that" the defendant's conduct was unlawful). Even if it is constitutional for a State to award compensatory damages for conduct that had not been defined as tortious when it occurred, the fact that the conduct had never before been labeled tortious should preclude it from being used as a predicate for the largest punitive damage verdict under Oklahoma law.

B. The Size Of The Award Cannot Be Justified By The Severity Of The Injury

The injury in this case was solely economic, but the Tenth Circuit refused to recognize any distinction between conduct causing death or severe personal injury and conduct causing only economic harm. App. 19a. However, whether personal injury

is threatened or inflicted, and the severity of bodily injury caused by a wrongdoer, are customarily considered as factors supporting enhancement of a penalty.[22] Yet the punitive damages award in this case is vastly larger than awards involving death or severe personal injury that were reduced on appeal because they were deemed excessive. *Mason* v. *Texaco, Inc.* 948 F.2d 1546 (10th Cir. 1991) (plaintiff's husband died of leukemia because of deliberate failure of defendant to provide warning of toxic chemical's danger; punitive damages cut from $25 million to $12.5 million), *cert. denied,* 112 S. Ct. 1941 (1992); *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir.) (victim died of asbestos poisoning; jury verdict of $25 million in punitive damages reduced to $1 million), *modified in part,* 13 F.3d 58 (3d Cir.), *cert. denied,* 114 S. Ct. 650 (1993). Therefore, the award is manifestly inconsistent with punishment levels in other cases involving far greater injury to the plaintiff.

It is also relevant that, as the Tenth Circuit noted in affirming the summary judgment on CTR's antitrust complaint, OXY had no monopolistic power in the relevant market and CTR had ample alternative recourse in the marketplace to respond to OXY's conduct and to use those alternatives to transport its gas to other markets. App. 68a-73a, 78a. There was therefore no objective basis in the record to multiply the $269,000 injury by a factor of 111 to assess a penalty.

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[22] For example, under the United States Sentencing Guidelines, the presence of physical injury will affect the offense level for certain crimes, and the amount of punishment permitted by the Guidelines will increase with the severity of the injury and the extent to which the defendant intended for physicial injury to occur. *See, e.g.,* U.S.S.G. § 2B3.1(b)(3) (offense level for robbery is increased by 2 levels if victim sustained "bodily injury," 4 levels for "serious bodily injury," and 6 levels for "permanent or life-threatening bodily injury"); § 5K2.1 (court may increase sentence beyond range prescribed by the Guidelines if death resulted and "[t]he extent of the increase should depend on . . . the extent to which death or serious injury was intended or knowingly risked"); § 5K2.2 (court may increase sentence beyond prescribed range if significant physical injury resulted).

C. The Size Of The Award Cannot Be Justified By Actual Or Potential Societal Harm Beyond The Damages Awarded In This Case

Given the discrete, temporary and solely economic injury to CTR, the courts below implicitly recognized that a $30,000,000 punitive damages award was patently excessive absent a showing that OXY's conduct inflicted societal harm materially more grave than the injury actually inflicted on CTR. Indeed, the Tenth Circuit acknowledged that the award was "a strikingly large figure" and "like winning a lottery because it immediately catapults the plaintiff (and perhaps his lawyer) to a position of great wealth." App. 21a.

The societal injury alleged here was a wholly insufficient predicate for a $30,000,000 punitive damages award. Unlike *TXO*, where there was evidence of the defendant's misconduct directed towards other parties, in this case the district court simply extrapolated OXY's conduct toward CTR to OXY's other producer contracts ("the record contains evidence of 6,000 contracts"). App. 15a n.14. But there was no evidence that OXY had dealt improperly with those other 6,000 parties. Nevertheless, the courts below drew the remarkable and wholly unsubstantiated inference that OXY's conduct toward CTR *might* someday be repeated towards others. Building on that ungrounded speculation, the trial court leaped to the bewildering *non sequitur* that "OXY's conduct incrementally damages the United States in its present struggle to remain a global economic power." App. 51a.[23]

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[23] Like the petitioner in *BMW*, OXY was punished on the basis of conduct and alleged societal harm outside the jurisdiction of the forum state. The court below justified the huge size of the award here is based on the alleged effect of OXY's conduct on the global competitiveness of the United States and on the wholly unproved premise of misconduct with respect to 6,000 producers and 18 processing plants located in numerous states. Even if there were proof of either misconduct or societal harm outside Oklahoma, such proof would not be a proper basis for a punitive damage award under the law of Oklahoma.

Gross and untethered speculation of this quality cannot satisfy this Court's due process insistence that punitive damages be reviewed by a rigorous analysis of objective factors. In fact, this brand of analysis is precisely why this Court has recognized that punitive damages can be exceptionally dangerous and prejudicial. Any tortious conduct in a private business relationship could be deemed—if extended to all other parties with whom the defendant did business or to the world economy—to have the potential to "suppress free enterprise" or "incrementally damage the United States." Any large company doing business with a number of parties could equally be said to have inflicted broad societal harm if it were found liable to any one of them. In short, if such speculation provides a rational basis for punitive damages against a substantial commercial enterprise, neither evidence nor constitutional analysis is necessary. *Cf. TXO*, 113 S. Ct. at 2734 (O'Connor, J., dissenting) ("Virtually any tort . . . can cause millions of dollars of harm if imposed against a sufficient number of victims.").[24]

D. The Size Of The Award Cannot Be Justified In Light Of The Alleged Profit Incentive To OXY

In *TXO*, a plurality of this Court upheld a $10 million punitive damage award based on the defendant's perceived profit motives. 113 S. Ct. at 2721-23. The plurality there found that there was evidence that TXO stood to profit by $5 million to $8.3 million from its conduct. *Id.* at 2722. Moreover, the record in *TXO* showed that the defendant's profit potential was

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[24] The Tenth Circuit's conclusion that OXY's conduct potentially impairs global competition stands in sharp contrast to the district court's holding on summary judgment that OXY's conduct did not even impair competition in the four-county relevant market in western Oklahoma. App. 68a-75a, 77a (finding "no reasonable showing of an adverse effect on competition in the marketplace as a whole"). In discussing CTR's antitrust complaint, the district court found the relevant market "vigorously competitive" and "thriving with competition," and ruled that OXY lacked any significant market strength. App. 73a, 78a.

expanded inasmuch as "this case was part of a larger pattern of fraud, trickery, and deceit." *Id.*

In this case, there was no such evidence. In fact, the contrary was true. The evidence showed that performance of the contracts, had they been valid and had they remained in effect, would have yielded a potential profit of $2.1 million over a twenty-year period on an undiscounted basis. App. 15a. But OXY could not have earned that profit by tortious interference. Before the alleged interference, CTR had filed state court lawsuits seeking rescission of the contracts. As the trial court noted, after CTR initiated this lawsuit, OXY pressed to have the validity of the contracts adjudicated as soon as possible. The $2.1 million future profit could have resulted only from full performance of the contracts, not from tortious interference. With a court decision on validity of the contracts imminent, there was *no* long term profit potential in interference.

The Tenth Circuit acknowledged that OXY's profit potential in relation to CTR could not justify the $30,000,000 award and therefore grounded its decision on "the *potential* widespread injury to large numbers of independent producers if OXY continued interfering with contracts." App. 16a (emphasis in original). There is no record evidence, however, that shows misconduct directed against any other producer.

E. The Size Of The Award Can Only Be Explained By OXY's Status As A Wealthy Corporation

It is apparent that the other factors cited by the courts below do not provide a rational or credible basis for the $30,000,000 penalty. This case, therefore, represents the realization of fears that the Court has often expressed, most recently in *Honda* and *Haslip*, that a jury, unconstrained by a specific jury instruction, and undeterred by a reviewing court, will inevitably accept the invitation of an open checkbook to express a bias against large corporations and award a massive windfall in the form of a grossly excessive punitive damage award. The procedures followed in this case produced a multimillion dollar verdict that

can *only* be explained as punishment based upon a large net worth.

The jury instructions in this case, coupled with the nature of the plaintiffs' closing argument, invited the jury to express antipathy towards large corporations with its verdict. The jury instructions provided the jury with only the most general guidance about punitive damages, and informed it that "[w]hile punitive damages must bear some relation to the injury caused by the offensive conduct as well as the conduct itself," those factors need "not necessarily bear any relation to the amount you awarded as actual damages." App. 83a. In short, although the jury was instructed that it could consider "many factors," only one was singled out for emphasis: "defendant's net worth." *Id.*

The Tenth Circuit believed that the jury instructions were "similar to those approved in *Haslip*." App. 13a. In fact, the instructions in this case were fundamentally different in one highly significant respect. In *Haslip*, the evidence of the defendant's wealth was *not* given to the jury, a factor mentioned three times by the *Haslip* Court. 499 U.S. at 6, 19, 22. In this case, not only was that evidence given to the jury, it formed the core of CTR's argument for a large award.

This instruction was preceded immediately by a typically inflammatory punitive damage closing argument in which CTR's counsel incited the passion and prejudice of the jury by referring repeatedly to OXY's financial position and inviting a verdict based on that fact alone:

> [T]heir daily revenues are over five million dollars. You know, that's 36 million dollars a week.
>
> . . .
>
> [Y]ou know 10, 20, 15 million dollars would be like having a hundred dollar traffic ticket to the rest of us. You start dealing with these giant companies and it takes a real wallop to be able to punish 'em. You know, what do you do with a kid when he's misbehaved? Take away his allowance for a week?

> You take away OXY's allowance for a week, that's 36 million dollars.

App. 87a. The trial court acknowledged that this argument was the key to the jury's $30,000,000 punitive damage award. App. 57a. Counsel's arguments thus "converted that grave risk of prejudice into a near certainty" by repeatedly telling the jury about the defendant's "massive wealth." *TXO*, 113 S. Ct. at 2738 (O'Connor, J., dissenting, joined by White & Souter, JJ.).

This case thus squarely presents the issue that concerned equally the plurality of the Court and the concurring and dissenting Justices in *TXO*, but not reached in that case: whether a "monumentally large punitive damages award" can be constitutionally justified based upon a large corporation's wealth. 113 S. Ct. at 2739 (O'Connor, J., dissenting). The decision below is inconsistent in that respect with the Seventh Circuit's approach in *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992), which held that awards of punitive damages against corporations cannot be justified simply on the basis of absolute size or net worth:

> If a larger firm is more likely to commit a wrong on any given transaction, then its total damages will increase more than proportionally to its size without augmentation in any given case; if a larger firm is equally or less likely to commit a tort per transaction, then the court ought to praise the managers rather than multiply the firm's penalty. Consider: General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this . . . .

Zazu, 979 F.2d at 508-09.

The Tenth Circuit has uncritically accepted the assumption that a large corporation's wealth—divorced from its conduct—is

the primary criterion for determining the appropriate size of a punitive damages award. As the Seventh Circuit has recognized, however, there is no rational connection between corporate size alone and the need for an inflated punishment to deter antisocial conduct.

This Court should grant certiorari to address the issue unresolved by *TXO*: the extent to which a punitive damages award may be predicated on the financial status of the defendant.

IV. THE $30,000,000 PUNITIVE DAMAGE AWARD IS GROSSLY EXCESSIVE IN VIOLATION OF THE DUE PROCESS CLAUSES

The foregoing analysis shows that, even apart from the improper emphasis on OXY's financial position, the $30,000,000 punitive damage award in this case cannot be justified with reference to any legitimate set of objective factors. As such, it is grossly excessive in violation of the Due Process Clauses of the Constitution. Therefore, if this Court does not reach or fully address the excessiveness issue in *BMW*, this case provides an appropriate opportunity to address the due process standards for excessiveness review of punitive damage awards.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration. Alternatively, if the case is not set for plenary review, the Court should retain the case on its docket and dispose of the case appropriately in light of its decision in *BMW of North America, Inc.* v. *Gore*.

Dated: May 8, 1995

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; GARY H. WRIGHT; CINDY WRIGHT; JEFFREY B. HUME; FARRAR OIL COMPANY,

Plaintiffs-Appellees,

v.

OXY USA, INC.,

Defendant-Appellant

and

WILLIAMS NATURAL GAS COMPANY,

Defendant.

No. 92-6350

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; GARY H. WRIGHT; CINDY WRIGHT; JEFFREY B. HUME; FARRAR OIL COMPANY,

Plaintiffs-Appellants,

v.

No. 92-6384

OXY USA INC. and WILLIAMS NATURAL GAS COMPANY,

Defendants-Appellees.

Appeals from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-90-1006-A)

FILED
Jan. 12, 1995

Before McWILLIAMS and LOGAN, Circuit Judges, and BROWN, District Judge.*

LOGAN, Circuit Judge.

Defendant OXY USA Inc. (OXY) appeals (No. 92-6350) a judgment entered after a jury verdict for plaintiffs[1] on their state tortious interference with contract claims and on OXY's counterclaim for breach of contract. Plaintiffs cross-appeal (No. 92-6384) the court's entry of summary judgment for OXY

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*The Honorable Wesley E. Brown, Senior United States District Judge, United States District Court for the District of Kansas, sitting by designation.

[1]Plaintiffs are Continental Trend Resources, Inc., Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust, Gary H. Wright, Cindy Wright, Jeffrey B. Hume and Farrar Oil Company.

on plaintiffs' federal antitrust claims and its denying plaintiffs attorney's fees for defending against OXY's counterclaim.

OXY first argues that we must reverse the tortious interference verdict because the district court erred in instructing the jury on the elements of tortious interference with existing and prospective contracts. OXY secondly argues that we must reverse the $30,000,000 punitive damages awarded in connection with the tortious interference claim because: (1) the jury instructions were erroneous, (2) the jury was permitted to award punitive damages for conduct (breach of contract and contract damages) for which punitive damages are not permitted under state law, (3) the procedures followed by the district court deprived OXY of due process of law, and (4) the punitive damages award was so excessive that it violated substantive due process and Oklahoma law. Alternatively, OXY asks us to order a remittitur. OXY finally argues that it is entitled to a new trial on its counterclaims for breach of contract because the court failed to properly instruct the jury.

Plaintiffs assert in their cross-appeal that the district court erred in dismissing their antitrust claims and in denying their attorney's fees for defending against OXY's breach of contract counterclaim.

I
Background

Plaintiffs own interests in gas wells in the Sooner Trend, a four-county area in Oklahoma. About 140 of these wells were connected to the Rodman gas gathering system owned by defendant Williams Natural Gas Company (WNG).[2] The Rodman system collected natural gas from wells in the Sooner Trend and transported it to the Rodman gas processing plant. OXY was part owner of the Rodman processing plant and

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[2]In 1985, plaintiffs acquired a number of contracts giving them an interest in wells connected to the Rodman system. These contracts included gas purchase contracts with WNG that were allegedly coterminous with gas processing agreements with OXY and gas purchase contracts with OXY.

operated both the plant and the gathering system.[3] The Rodman plant extracted natural gas liquids and dehydrated and compressed gas from the Rodman gathering system; the tailgate of the Rodman Plant fed into WNG's high pressure interstate pipeline. WNG did not own any facilities to compress or dehydrate gas.[4] Plaintiffs' gas required some dehydration in order to meet the WNG pipeline's quality requirements and compression to enter WNG's high pressure line.

Before the mid-1980s all of the gas on the Rodman system was sold to WNG for resale to its customers. In July 1988 WNG began offering gathering and transportation services on the Rodman system as an open access transporter pursuant to the Federal Energy Regulatory Commission (FERC) Order No. 436, which enabled gas producers to deal directly with gas buyers rather than through intermediary interstate pipelines. An open access transporter is required to

> provide access to all shippers on a "first-come, first-served" basis, even if the shipper intends to compete with the pipeline company in the sale of gas. . . . The purpose . . . is to increase downstream competition in natural gas sales by ensuring that sellers who do not transport their own gas have access to transportation facilities.

Colorado Interstate Gas Co. v. FERC, 890 F.2d 1121, 1123 (10th Cir. 1989) (citations omitted); *see also Northern Natural Gas Co. (Div. of Enron Corp.) v. FERC*, 929 F.2d 1261, 1263-

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[3]WNG owned the gathering lines; OXY operated and maintained those lines. This arrangement originated with the predecessors in interest of OXY and WNG to avoid uneconomical gas processing at the Rodman plant.

[4]After the district court's entry of summary judgment on the antitrust claims, WNG and OXY transferred their interests in the Rodman gathering system to Trident NGL, Inc. and Oryx Energy Co., and the Federal Energy Regulatory Corporation (FERC) entered an order approving abandonment of the Rodman gathering system from FERC jurisdiction. *Williams Natural Gas Co.*, 61 F.E.R.C. ¶ 61,285 (1992).

64 (8th Cir.), *cert. denied*, 112 S. Ct. 169 (1991) (open access policy was means by which FERC sought to increase competition in the market for natural gas). WNG's tariff set forth the terms and conditions of service, including the fee for transporting gas.

In 1989, plaintiffs asserted that their gas purchase and processing contracts with defendants had expired or terminated[5] and sought open access so that they could sell gas to entities other than WNG and OXY. However, WNG denied plaintiffs' requests to transport gas to other parties. Plaintiffs assert that OXY and WNG told them that bypassing the Rodman plant was impossible.

Plaintiffs then filed the instant suit in June 1990, alleging that OXY and WNG violated federal and state antitrust laws by monopolizing and conspiring to monopolize transportation and processing of gas with contracts tying gas processing to gas transportation, and by denying plaintiffs access to essential facilities. Plaintiffs also contended that defendants tortiously interfered with plaintiffs' existing and prospective contracts under Oklahoma law. In support of the tort claim, plaintiffs alleged that although OXY knew that its gas purchase or processing contracts with plaintiff had expired or were invalid, OXY refused to allow plaintiffs to utilize the Rodman system to market gas, and shut-in plaintiffs' wells, stopping their flow of gas. Plaintiffs also claimed that OXY contacted potential purchasers of plaintiffs' gas, and falsely asserted OXY had contractual rights to that gas. OXY counterclaimed, alleging conversion and that plaintiffs breached their contractual duties to OXY by attempting to sell gas to third parties. In its counterclaims OXY asserted that its contracts with plaintiffs continued to be valid.

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[5]In 1989, plaintiffs brought suit in Oklahoma state court, alleging that OXY had breached four groups of contracts—the Mosier Farm, the casinghead gas, the processing agreements, and the Henneman contracts—and requesting, among other relief, formal rescission of those contracts and damages. There is no indication in the record that this litigation was other than pending at the time of trial.

The district court granted defendants' summary judgment motion on the federal and state antitrust claims, but denied summary judgment on the tortious interference state claims.[6] The remaining claims and counterclaims were then tried to a jury.

OXY and WNG moved for a directed verdict at the close of plaintiffs' evidence on the tortious interference claims. The district court granted WNG's motion but denied OXY's, except as to certain damages. The district court also denied plaintiffs' motion for a directed verdict on OXY's contract counterclaims, except as to certain wells. At the conclusion of the evidence the district court found that there was clear and convincing evidence on which OXY could be found liable for punitive damages under Okla. Stat. tit. 23, § 9, and submitted the punitive damages question to the jury.[7]

The jury rendered a general verdict for plaintiffs on the tortious interference claim against OXY and awarded compensatory damages of $269,000[8] and punitive damages of $30 million. The jury returned a general verdict against OXY on its contract counterclaims. The district court denied OXY's motions to alter or amend the judgment, for remittitur, for

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[6]The district court also denied plaintiffs' motion for partial scary judgment on the validity of certain processing agreements and a November 3, 1987 letter agreement.

[7]Okla. Stat. tit. 23, § 9 provides that punitive damages are limited to the amount of actual damages unless before submitting the case to the jury the judge makes a finding to "that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."

[8]The district court permitted plaintiffs to present two categories of damages to the jury: (1) market value damages" of approximately $90,000 for gas that actually flowed but was sold at a lower price than plaintiffs claimed they could have received; and (2) "shut in damages" of approximately $178,000 for gas that did not flow. *See* VII Appellant's App. 2382, 2420-21.

judgment notwithstanding the verdict, or for new trial. These appeals followed.

II
Tortious Interference Claims

OXY asserts that we must reverse the jury verdict on tortious interference because it was based on improper jury instructions. Although in a diversity case the substance of jury instructions is a matter of state law, the acceptance or refusal of a tendered instruction is a procedural matter governed by federal law. *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1296 (10th Cir. 1989). In reviewing jury instructions we consider them as a whole and ask whether they accurately stated the governing law and provided the jury with an ample understanding of the issues and the applicable standards. *Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1564 (10th Cir. 1993). The controlling questions are whether the jury was misled and whether the instructions provided an understanding of the issues and explained the jury's duty to determine those issues. *Estate of Korf v. A.O. Smith Harvestore Prods, Inc.*, 917 F.2d 480, 484 (10th Cir. 1990). We will reverse only if an erroneous instruction is prejudicial in light of the record as a whole. *Mason v. Texaco. Inc.*, 862 F.2d 242, 246 (10th Cir. 1988) (*Mason I*).

Oklahoma law requires a party claiming tortious interference with contract or business relations to prove that (1) it had a business or contractual right that was interfered with, (2) the interference was malicious and wrongful (not justified, privileged, or excusable), and (3) the interference proximately caused damage. *James Energy Co. v. HCG Energy Corp.*, 847 P.2d 333, 340 (Okla. 1993); *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 654 (Okla. 1990), *limited on other grounds by Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 193 (Okla. 1992). For purposes of this appeal we accept plaintiffs' proposition that the plaintiff in a prospective contractual relations case must show absence of privilege or

justification.[9] *See Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1505-07 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993). We review OXY's specific arguments with regard to the jury instructions within this Oklahoma law framework.

OXY asserts that the district court erred in refusing to instruct the jury that (1) OXY's refusal to deal could not constitute tortious interference; (2) communication of truthful information could not constitute tortious interference; and (3) performance of a contract is relevant to the interpretation and validity of the contract. OXY relies in part on Supplemental jury instructions that it claims to have tendered to the district court before the close of the trial; however, these supplemental jury instructions were not part of the district court record. Our review of the tortious interference jury instructions does not include the proposed supplemental instructions, which are not part of the district court or appellate record.[10]

OXY first claims the district court erred in refusing to instruct the jury that any refusal to deal by OXY could not constitute tortious interference. OXY specifically objected to the instructions given, preserving this issue for appeal. *See* Fed. R. Civ. P. 51; *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1390 (10th Cir. 1987) (purpose of Fed. R. Civ. P. 51 is to "provide[] the

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[9]Defendants point out that no Oklahoma case has yet held a party liable for tortious interference with prospective contractual relations.

[10]Plaintiffs filed a motion to strike portions of the Supplemental Appendix to Reply Brief of Appellant OXY USA, Inc. and Response Brief of Cross-Appellees OXY and Williams Natural Gas Co. (supplemental appendix) because they included materials not in the district court record. OXY moved to supplement the record approximately 21 months after the trial. The district court denied that motion, stating "[i]t is simply too late in the game to add these [proposed jury] instructions to the record. Defendant has previously taken the position, adverse to plaintiffs, that any instructions submitted after March 6, 1991 were out of time, yet now wants to add unfiled instructions dated April 24, 1991." III Appellant's Reply App. 4092. We grant plaintiffs' motion to strike the "proposed" jury instructions and deny defendants' motion to supplement the record.

trial court with an opportunity to make proper changes to the jury instructions"); *see also Elmore v. United States*, 843 F.2d 1128, 1133 (8th Cir. 1988) (timely and proper objection that apprised the district court of an alleged omission in instructions preserved error on appeal despite failure to propose instruction).

We reject OXY's contention that the district court erred in declining to instruct the jury on a refusal to deal. "Plaintiffs did not argue that OXY's refusal to deal with Plaintiffs caused them damages. Rather, Plaintiffs [asserted] that it was OXY's 'requirement to deal' in order to use WNG's System which harmed Plaintiffs." Answer Brief of Plaintiffs-Appellees/Cross-Appellants to OXY USA, Inc.'s Brief-in-Chief and Brief-in-Chief of Plaintiffs-Appellees/Cross-Appellants on Cross-Appeal at 21. The district court did not err in refusing an instruction that did not address a claim (or defense) of a party.

OXY next asserts that the district court erred in failing to instruct the jury that truthful communication is privileged. Because the "proposed" instruction is not part of the record, nor preserved for appeal, we consider only OXY's related claim that the instruction given was improper. The district court instructed the jury that if OXY's interference was made with "honest intent," that interference was justified, and that if OXY had a legitimate economic interest in the subject matter of the contract or if it was seeking to protect its own contract rights, such conduct also was privileged and the verdict should be for OXY. OXY argues that the jury could have been misled into basing liability solely on OXY's alleged motive regardless of the truth of the statements. We conclude that use of the "honest intent" language was sufficient to prevent the jury from finding tortious interference if it also found that the communication was truthful. The instruction comports with Oklahoma law, which recognizes that allegedly improper interference may be justified, privileged or excused. Speculation that OXY's allegedly improper motive may have driven the jury to find liability without regard to the truthfulness of OXY's statements is not a sufficient basis to conclude the jury instructions were improper.

OXY finally asserts the district court should have instructed the jury that performance of a contract is relevant to its interpretation and validity. Because OXY did not preserve this issue for appeal, we review for plain error. *See United States v.*

Zimmerman, 943 F.2d 1204, 1213 (10th Cir. 1991). The district court instructed the jury that OXY contended that all of its contracts with plaintiffs were valid and binding. The district court also instructed the jury that OXY maintained that the terms of the contract were reflected by the conduct and written agreements of the parties. These instructions are correct statements of the applicable law and not clearly erroneous.

In sum, the jury instructions on tortious interference addressed each element of the claim and framed the issues for the jury. The district court permitted OXY to submit its theory of the case in a contention instruction. The court did not err in the selection of jury instructions because as a whole, they "properly guided the jury in its deliberations." *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 468 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990).

III
Punitive Damages Award—Jury Instruction Errors

OXY argues that we must reverse and order a new trial because the jury instructions permitted the jury to award punitive damages for breach of contract and contract damages contrary to Oklahoma law. The district court denied OXY's requested jury instructions that (1) under Oklahoma law punitive damages must be based on the act that constitutes the cause of action, *see Garland Coal and Mining Co. v. Few*, 267 F.2d 785, 790 (10th Cir. 1959), and (2) Oklahoma law prohibits punitive damages for breach of contract. *See Burton v. Juzwik*, 524 P.2d 16, 19-20 (Okla. 1974). The court gave the following instruction: "If you find in favor of plaintiffs on their *tortious interference* with an existing contract claim, their tortious interference with expected contractual business relations claim, or both, then you may award plaintiffs punitive damages." II Appellant's App. 528.

OXY first argues that the instructions permitted the jury to award punitive damages for breach of contract, relying on *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986), in which the jury awarded compensatory damages based on both personal injury and property damage and awarded $10 million in punitive damages. In *Silkwood*, we reversed the compensatory award for the

personal injury but upheld the award for property damage. Then, although an award for property damage would have supported a punitive award, we vacated the award and ordered a new trial on punitive damages because we could not determine to what extent the punitive award was based on the property damages that were upheld. *Id.* at 1461.

Silkwood is distinguishable from the instant case. In proving their tortious interference claim plaintiffs here necessarily had to show that their contracts with OXY were not valid at the time of OXY's tortious conduct; thus plaintiffs presented evidence that OXY had breached those contracts. But even though part of the proof may have been breach of contract, the cause of action here was tortious interference, and the jury was specifically instructed on the tortious interference claim.[11] The district court correctly instructed the jury on punitive damages.

In a related argument, OXY asserts that the jury instructions erroneously allowed a punitive damage award based in part on contract damages. Our review of the record, however, indicates that any evidence of contract damages was incidental to proving breach of contract.

IV
Punitive Damages—Procedural and Substantive Due Process

OXY makes a multiprong attack on the punitive damage award. It strenuously argues that the award violated both

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[11]OXY points out that in reviewing the punitive damages award the district court relied on OXY's alleged failure "to perform material obligations set forth in the contracts, including failure to pay for the gas taken, and improperly charg[ing] a gathering fee . . . and fraudulently induc[ing] plaintiffs into entering certain contracts." II Appellant's App. 794. OXY alleges that the district court failed to recognize that breaches of contract, misconduct and fraud cannot be the basis for punitive damages in Oklahoma. But, the district court concluded that the contract breaches, fraudulent inducement and misconduct were all evidence of OXY's *motive* in the tortious interference claims. *Id.* at 793-94.

procedural and substantive due process. We first address OXY's procedural due process argument.

A
Procedural Due Process

In *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the Supreme Court noted that its recent opinions "strongly emphasized" the importance of the procedural component of the Due Process Clause. *Id.* at 2335 (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993)) (the award had been reviewed and upheld by the district court and unanimously affirmed on appeal which created a strong presumption of validity); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17, 20-21 (1991) (common law method of assessing punitive damages did not violate procedural due process; stressing the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review)). These opinions set out the test for determining whether OXY received procedural due process on the punitive damages award.

In *Haslip* the Supreme Court considered whether the common law method for assessing punitive damages in Alabama afforded procedural due process. The three-tier common law approach to punitive damages, also employed in Oklahoma, first provides that the jury is instructed on the proper purpose for punitive damages and is told to consider the seriousness of the wrong and the amount needed to deter wrongful conduct. Second, the district court then reviews the jury award for excessiveness. Finally, the appellate court reviews the award. The Supreme Court held that this three-step process comports with due process. *Haslip*, 499 U.S. at 15.

OXY argues that the procedure in this case did not provide adequate limits on the jury's discretion to award punitive damages as required by *Haslip and Honda*. *See Silkwood*, 769 F.2d at 1461 (10th Cir. 1984) (Oklahoma courts provide little guidance to juries in imposing punitives). The jury instructions approved in *Haslip* provided the jury "significant discretion," but also "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." *Haslip*, 499 U.S. at 19. In the

instant case the jury was instructed that the purpose of punitive damages was to punish for misconduct and to serve as an example to others to deter them from similar conduct. The jury was advised that any award of punitive damages must be based on "sound reason and calm discretion" and not on the basis of "sympathy, bias or prejudice."[12] II Appellant's App. 529. The jury instructions stated that punitive damages must bear some relationship to both "the injury caused by the offensive conduct" and the conduct itself (but not necessarily to the amount of actual damages awarded). *Id.* These instructions were similar to those approved in *Haslip*. *See* 499 U.S. at 6. Although OXY argues that more guidance should have been given, the failure to do so was not unconstitutional. *See Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992).

OXY also contends that the instruction was improper because the jury was allowed to consider the wealth of the defendant. But the plurality in *TXO* noted that "in *Haslip* we referred to the 'financial position' of the defendant as one factor that could be taken into account in assessing punitive damages." *TXO*, 113 S. Ct. at 2723 (plurality); *see also Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373, 380 (8th Cir. 1993) (allowing a jury to consider defendants' financial worth in deciding whether to award punitive damages is constitutionally permissible), *cert. denied*, 114 S. Ct. 2120 (1994). Further, OXY's argument that net worth was the *only* factor the jury was allowed to consider is disingenuous; as we have discussed, the jury was told to weigh various factors.

OXY also asserts that the jury should have been instructed to consider the objective standards in the Oklahoma statute in considering whether to award and the amount of punitive damages. The district court (on post-trial motions) and appellate courts and not the jury review the award against those standards. *See Haslip*, 499 U.S. at 20-22. The jury was instructed by what

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[12]Also, in its general instructions on damages the district court stated that the award must be just and reasonable and based on the evidence. II Appellant's App. 521.

was an essential paraphrase of Okla. Stat. tit. 23, § 9—the same statutory standard the district court used to "lift the lid" that otherwise would have limited punitives to the amount of the compensatory damages. *See* II Appellant's App. 528-30.

The second phase of the common law method for assessing punitive damages is adequate review by the district court. OXY argues that the district court's review here was inadequate in that it should have compared the award in this case with awards in similar cases. The Supreme Court has rejected the notion that a district court must articulate the reasons for upholding a punitive damages award; thus we will not require a district court to set out a comparative analysis when reviewing punitive damages. *See TXO*, 113 S. Ct. at 2724. OXY incorrectly asserts that the district court made no effort to articulate a basis for the award other than wealth. In fact, the district court made an in-depth analysis of the four factors considered in determining the reasonableness of an award of punitive damages under Oklahoma law: (1) cause and extent of plaintiff's injury, (2) harm to society, (3) culpability as evidenced by defendant's profit incentive, and (4) defendant's wealth.[13] II Appellant's App. 791-814.

The district court first considered the reasonableness of the award in light of the cause and extent of plaintiffs' injury. *See Chandler v. Denton*, 741 P.2d 855 (Okla. 1987); *Hobbs v. Watkins*, 481 P.2d 746, 754 (Okla. 1971). Essentially OXY argues that the harm to the plaintiffs here was not great and that the district court's statements that plaintiffs were deliberately shut-in and their business was almost decimated, were not supported by the evidence. The district court's analysis, however, is supported by the evidence. For example, the record reflects that OXY closed the valves on twelve wells. The district court also relied on OXY's untruthfulness to third parties with whom plaintiffs were attempting to conduct business, and the

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[13]OXY in its substantive due process argument attacks the district court's findings on each of these Oklahoma standards. We believe they are more meaningfully reviewed here in the procedural due process portion of the opinion.

jury's findings "that OXY's conduct was oppressive, wanton or associated with ill will or spite towards plaintiffs." II Appellant's App. 791.

Second, the district court considered whether the award was justified by the harm caused to society. The district court determined that OXY intended to injure plaintiffs and wrongfully destroy honest competition. The district court concluded that OXY's behavior had a potentially very negative impact on the public, the ultimate consumer of energy resources. OXY takes issue with the district court's statement that "OXY's conduct incrementally damages the United States in its present struggle to remain a global economic power." *Id.* at 797. The district court did not assert that OXY's conduct was largely responsible for our society's economic problems, however, rather it indicated that OXY should be an example to deter others from suppressing free enterprise.[14]

Third, the district court considered OXY's profit incentive, apparently as a subset of defendant's culpability. *See Silkwood*, 769 F.2d at 1466 (Doyle, J., dissenting). OXY attacks the district court's statements that "OXY itself introduced evidence that suggested that its profit incentive was in excess of $4.25 million." II Appellant's App. 797. OXY also challenges the $10 million potential profit figure that the plaintiffs offered and the district court appeared to adopt. *See id.* We agree with OXY that some of these figures appear to be incorrect or misapplied.[15]

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[14]OXY argues that the district court relied on a misstatement by plaintiffs' counsel that "6000 contracts were affected, involving 100,000 producers," *see* II Appellant's App. 798, but the record contains evidence of 6,000 contracts. *See* VIII Appellant's App. 2705.

[15]OXY correctly points out that the actual figure for its profit incentive is half of the $4.25 million because OXY only owned half of the plant. OXY also attacks the district court's statement that "plaintiffs contend that OXY stood to ultimately profit by approximately $10 million from its unlawful conduct" and therefore the punitive award was only three times OXY's profit. The district court also noted that OXY could only directly profit by a factor of 50 percent

The district court's analysis of this factor, however, is broader, and acknowledges the *potential* widespread injury to large numbers of independent producers if OXY continued interfering with contracts. Thus, the district court appeared focused on punitive damages as a deterrent to ill-gained profits.

OXY contends that the district court improperly assigned culpability to an OXY official's statement that "if we let this happen with one producer, we could expect for everybody to want to jump right in the middle of us and do the same thing. So we were trying to protect our plant." *Id.* at 799. OXY insists that this was merely a business person trying to protect the corporation's contract rights. But the district court was left with the "indelible impression" that OXY was worried about producers getting restless and decided to "get out there and subdue them" so that OXY did not lose control. *Id.* While OXY disputes the characterization of this statement, apparently the jury also agreed. We cannot say from the cold record that this interpretation was inaccurate.

Finally, the district court analyzed OXY's wealth. Although OXY acknowledges that the financial condition of a defendant is relevant, *see Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241, 1251 (Okla. 1993); *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 42, 46 (Okla. 1984); *see also Spaeth v. Union Oil Co.*, 710 F.2d 1455, 1460 (10th Cir. 1983), *appeal after remand*, 762 F.2d 865 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986), it argues that the jury instruction unfairly singled out wealth and followed an inflammatory closing argument. As we have already discussed, *TXO* indicates that telling the jury that they may consider a corporation's or individual's wealth is not a violation of procedural due process. Further, the jury was

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of that $10 million total because of co-owner WNG's interest. Therefore the punitive damage award was actually six times OXY's potential profit.

also told to consider the type of conduct and the necessary deterrent effect.[16]

In addition to looking at these four factors, the district court also reviewed the award for excessiveness. It correctly noted that Oklahoma law does not require the amount of punitive damages to be a particular ratio to the amount of actual damages, *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1115 (Okla. 1991), but instead focuses on the harm defendant's conduct caused or might potentially cause. *Id.; see also Silkwood*, 769 F.2d at 1460 (although proportionality is not required, there must be some relationship to the injuries actually suffered and to society as a whole). The district court considered the ratio of actual to punitive damages, and also that the award was less than one percent of OXY's net worth.

The district court determined that the punitive damages were appropriate to serve their purposes (citing *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983)). Our review of the record and the district court's order indicates that procedural due process was afforded both in the jury instructions and in the district court's review of the award.[17] *See also Morgan v.*

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[16]We also note that OXY did not raise a contemporaneous objection to the instruction as to specificity and did not submit a more detailed instruction that it now insists was required. Therefore this objection is waived. *See Rogers v. Northen Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978); *see also* Fed. R. Civ. P. 51.

[17]OXY also asserts that jury discretion was not adequately limited because in lifting the Oklahoma cap on punitive damages the district court considered conduct other than OXY's alleged tortious interference with contract and potential contract. Thus OXY argues that this statutory safeguard was not available to them. The Oklahoma statute allows the jury to award punitives above the amount of actual damages only if the district court finds on the record that there is clear and convincing evidence "of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed." Okla. Stat. tit. 23, § 9; *see also Rodebush v. Okla. Nursing Homes, Ltd.*, 867 P.2d 1241, 1246-48 (Okla. 1993). Section 9 provides defendants with procedural protection beyond that required by

Woessner, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994). The final procedural due process safeguard is our substantive review of the amount of the punitive damages award.

B
Substantive Due Process/Excessiveness

We review a punitive damage award to insure that "it does not exceed an amount that will accomplish society's goals of punishment and deterrence." *Haslip*, 499 U.S. at 21 (quoting *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989)). We focus on whether the punitive damages are reasonable as to their amount and rational in view of their purpose to punish and deter defendant's conduct. *Id.*

The evaluation of whether a jury's award of punitive damages was excessive is a matter of federal law, even though the justification for punitive damages is a matter of state law. *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 819 (10th Cir. 1993). In this circuit we have asked whether the award was "so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981) (in banc), *cert. denied*, 464 U.S. 824 (1983). The Supreme Court in *Haslip* suggested that a "manifestly and grossly excessive" standard does not satisfy due process. *Haslip*, 499 U.S. at 21 n.10. Thus, the Fourth Circuit in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105 (4th Cir. 1991), *modified by Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414 (4th Cir. 1992), determined that South Carolina's "excessiveness" standard for reviewing punitive damages did not comport with due process. We believe, however, that our

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common law. We have reviewed the entire record and while the district court may have supported his lifting of the damages cap with some conduct other than tortious interference, the record supports the action of the judge in lifting the cap based on OXY's conduct.

standard satisfies constitutional standards because in determining whether the award meets the excessiveness standard, we also consider the state's substantive factors. *See Capstick*, 998 F.2d at 819 n.13 (citing *Malandris*, 703 F.2d at 1172-73).

OXY argues that the $30 million punitive damages award can be explained only by passion or prejudice. *See Kelley v. Sears. Roebuck & Co.*, 882 F.2d 453, 459-60 (10th Cir. 1989); *Dearmore v. Gold*, 400 F.2d 887, 888 (10th Cir. 1968). OXY asserts that plaintiffs' closing argument was inflammatory on the issue of OXY's wealth. Plaintiffs' attorney stated that OXY earned over $36 million a week and urged the jury to "[t]ake away OXY's allowance for a week, that's 36 million dollars." VIII Appellant's App. 2767. Although OXY may be correct that the jury considered the $36 million figure in reaching the $30 million punitive award, we cannot conclude on the record as a whole that the jury acted out of passion or prejudice.

OXY also argues that compared to cases in which innocent people died as a result of egregious corporate conduct, this case, involving purely economic loss, does not call for such a large punitive damage award, citing *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (*Mason II*) ($25 million punitives remitted to $12.5 million), *cert. denied*, 112 S. Ct. 1941 (1992), and *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) ($10 million punitives upheld in toxic shock death), *cert. denied*, 486 U.S. 1032 (1988). OXY does not cite any cases holding that punitive damages in economic injury cases must be less than those in personal injury cases, and we have found none. We note that recent highly publicized awards against major oil companies Exxon and Texaco involved punitive damages awards of billions of dollars for economic injury.

OXY also argues that the ratio of punitives to compensatory damages, here 111:1, is indicative of an excessive award. OXY relies on *Haslip* for the proposition that the four to one ratio there was "close to the line." 499 U.S. at 23. The Supreme Court recently, however, upheld a punitive damages award with a ratio of over 526:1. *TXO*, 113 S. Ct. at 2721. The Court "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." *Id.* The *TXO* opinion noted that even if plaintiff's figures were exaggerated, the jury could have believed that there was a multimillion dollar

reduction in defendant's royalty payments. Although plaintiffs here may have exaggerated the amount of potential profit to OXY, the record indicates that profit was in the million dollar range. After *TXO*, we cannot conclude that the disparity between actual and punitive damages is controlling. An 111:1 ratio is not necessarily an excessive award, particularly in light of defendant's net worth.

The jury apparently considered the wealth of the defendant, a large oil company with a parent company worth over a billion dollars, in determining the amount needed to punish and deter. *See Haslip*, 499 U.S. at 21 (punitive damage award must be reasonable in amount and "rational in light of [the] purpose to punish what has occurred and to deter its repetition"), OXY cites several cases in which the net worth in 1990 of the defendant companies was greater than OXY's, yet smaller punitive awards were found excessive. *See Mason II*, 948 F.2d 1546 ($9 billion net worth); *Kelley*, 882 F.2d 453 ($12.8 billion net worth - $1.25 million award found excessive); *Spaeth*, 710 F.2d 1455 ($2.5 billion net worth - $3 million award excessive). Of course, the ratio of a defendant's worth to the punitive damages awarded is not a benchmark of excessiveness. *See, Mason II* (a previous jury had declined to award any punitive damages); *Spaeth* (actual damages of $22,807); *Kelley* (new trial ordered on compensatory damages issue; court noted that Colorado law requires punitive damages to bear some relationship to actual damages, thereby also providing support for new trial on punitive damage issue). More fundamentally, however, we would exceed our scope of review if we required symmetry in the manner OXY suggests.

OXY further contends that the sheer size of the award alone shocks the judicial conscience, and therefore we should order a remittitur. OXY notes that this is the largest punitive damages award in Oklahoma history and is twice the amount of any award upheld in this circuit, citing *Mason II*. The size of an award alone is not enough to establish passion and prejudice. In *Mason II*, a man died of leukemia after using a benzene test kit that contained no warning. The jury awarded his estate and spouse $9,025,000 in actual damages. We determined that the punitive damages award for $25 million was a "staggering sum" that "shock[ed] our judicial conscience" and was "excessive and beyond a reasonable punitive award under the law of Kansas." *Mason II*, 948 F.2d at 1560-61. On its face, *Mason II* appears

to support OXY's argument. This court noted that in *Mason II* "it was significant to the panel that in the first trial . . . the plaintiff sought punitive damages of only $8 million and the first jury did not award any punitive damages." *Capstick*, 998 F.2d at 820. In *Mason II*, the panel believed the punitive damage award was aberrational.

To be sure $30,000,000 is a strikingly large figure when viewed from the perspective of three judges whose combined incomes in their lifetimes will not come close to that figure. Viewed from the perspective of a successful individual plaintiff (and his lawyer if on a contingent fee) the reward is like winning a lottery because it immediately catapults the plaintiff (and perhaps his lawyer) to a position of great wealth. But examined from the perspective of what is necessary to punish a very wealthy corporation, and to deter it and other similarly situated from like behavior—which we are required to do—30,000,000 is not necessarily a shocking figure.

Our own review of the voluminous record reveals several factors that support the extremely large punitive damages award. The district court summarized those factors when it found clear and convincing evidence to lift the cap on punitives: (1) OXY withheld payments it owed to plaintiffs to induce plaintiffs to change their position; (2) OXY changed its position on the status of contracts based on a reassessment of their strategic position; (3) OXY employees altered internal documents containing damaging statements; and (4) OXY selectively incorporated charges agreed to in contracts to benefit OXY at plaintiffs' expense. VIII Appellant's App. 2738-39. Further, after the hearing on the motion for new trial or remittitur, the district court noted "that there had been a complete change in the position of [OXY] with respect to the coterminous provisions and whether those contracts retained validity." *Id.* at 2762. The district court also observed that he jury was "visibly reactive to" the testimony of OXY's corporate representative that "'we cannot let [plaintiffs] get away with this or everybody else will try to do it [bypass Rodman]. It was a 'the natives are restless, we better get out there and subdue them' kind [of] presentation." *Id.*

The jury heard voluminous evidence that OXY engaged in oppressive and coercive behavior that interfered with plaintiffs'

present and prospective contracts; the consequences of such unchecked behavior could be disastrous. The district court properly allowed the jury to consider the potential harm that might result if defendant's conduct continued unabated. *TXO*, 113 S. Ct. at 2722. The jury evidently was persuaded that only a very sizeable award would truly punish OXY and deter future tortious conduct. We will not disturb the jury's award.

V
Breach of Contract Counterclaim

OXY asserts that the district court improperly failed to instruct the jury that performance is relevant in the interpretation and validity of contracts. OXY correctly points out that the validity of the contracts between the parties was a central element of its claims. But the jury was charged to consider the conduct of the parties in determining whether or not the contracts were valid; we discern no error and deny OXY a new trial on this claim of error.

VI
Antitrust Claims

Plaintiffs appeal the district court's grant of summary judgment for OXY and WNG on plaintiffs' antitrust claims, which asserted

> that through concerted efforts OXY and [WNG] have jointly controlled the flow of gas and transportation of gas on the Rodman Gathering System by requiring any person who wants to transport gas on the System to enter into arrangements with OXY for the compression, treating and processing of that gas. OXY provides the only field compression on the System and will not provide compression unless Plaintiffs agree to have their gas processed at the Rodman Plant. When OXY demanded that Plaintiffs continue to have their gas treated and processed at the Rodman Plant as a condition to collecting and transporting over the Rodman Gathering System, Plaintiffs rejected this demand. Thus, Defendants have refused to provide transportation service for Plaintiffs' gas to their customers unless Plaintiffs

> agree to have their gas processed by OXY. Plaintiffs allege, in part, illegal tying, conspiracy to restrain trade and conspiracy to monopolize.

I Appellant's App. 257-58 (quoting Order Denying Defendants' Motions for Protective Orders, No. CIV-90-1006-A, at 3-4 (W.D. Okla. Mar. 21, 1991)). Plaintiffs appeal summary judgment only of the Sherman Act § 1 tying claim and the conspiracy to restrain trade claims.

We review the entry of summary judgment applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c). *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991). "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Id.* We review de novo the district court's conclusions of law, and read the record in the light most favorable to the parties opposing the motion for summary judgment. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992). We acknowledge that summary judgment in antitrust cases is generally disfavored, *id.;* however, "allegations of restraint of trade must be supported by significant probative evidence in order to overcome a motion for summary judgment." *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 638 (10th Cir. 1987) (quoting *Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co.*, 817 F.2d 639, 644 (10th Cir. 1987) (citations omitted).

A
Tying

In their § 1 tying claim, plaintiffs alleged that in order to purchase transportation on the Rodman system they were forced to purchase gas processing through OXY's Rodman plant. Plaintiffs specifically asserted that WNG in cooperation with OXY used a nomination procedure to thwart competition. WNG's nomination procedure required a shipper to submit a nomination informing WNG of the amount of gas to be shipped and the location of the receipt and the delivery points. WNG requested confirmation of the nomination from the gas producer and the recipient of the gas. WNG also sought OXY's confirmation of all nominations even though the tariff contained

no such precondition. Plaintiffs alleged that OXY, with WNG's express consent, systematically refused to confirm gas that was not destined for processing at the Rodman plant.

In response, WNG and OXY asserted that although WNG was an open access transporter, the existing system did not allow movement of gas from the Rodman gathering system to WNG's transmission line without going through OXY's Rodman plant. WNG produced evidence that it provided plaintiffs with other options to move gas from the Rodman area to WNG's main transmission line, including arranging with a third party to perform necessary compression and treating of gas, or by installing a gathering compression and treating facility, or by arranging with a third party to use their facility. WNG also informed plaintiffs that there were existing gathering lines and processing plants owned by other companies in the Rodman area that connected either directly or indirectly to WNG's transmission system through which plaintiffs could move their gas to WNG's system and avoid OXY's facilities.

The district court found that "[p]laintiffs cannot prove anticompetitive tying," and also stated "the tying claim fails for the same reason of lack of monopoly power, based on insignificant market strength, that immobilized the monopolization and abuse of monopoly power claims." I Appellant's App. 268-69 (district court order) citing *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1294-98 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990)).

"A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . . Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2079 (1992) (citing *Fortner Enters, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969) (internal citation omitted)). Thus there are three elements necessary to a tying claim.

> First, purchases of the tying product must be conditioned upon purchases of a distinct tied

> product. Second, a seller must possess sufficient power in the tying market to compel acceptance of the tied product . . . . Finally, a tying arrangement must foreclose to competitors of the tied product a "not insubstantial" volume of commerce.

Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc., 806 F.2d 953, 957 (10th Cir. 1986) (citations omitted). Plaintiffs assert that they demonstrated material issues of fact existed on each of the three tying elements and summary judgment was improper. Because we believe plaintiffs failed to meet their burden on at least one of the three elements, we uphold the grant of summary judgment.

The district court found, *inter alia*, that the tying claim failed on the element of market or economic strength.[18] I Appellant's App. 269. The district court "reject[ed] outright plaintiffs' self-serving assertion that defendants control virtually one hundred percent (100%) of the relevant market, which plaintiffs define as the area consisting of only the low-volume wells requiring long-term contracts, and which is controlled exclusively by the Rodman Gathering System." *Id.* at 261.[19] The district court determined that no reasonable jury could accept that definition; the smallest relevant market would be the four-county area where the gas wells at issue are located. The district court also found that a market based on sources of natural gas that are in close proximity to a pipeline is an

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[18] In analyzing the monopolization and abuse of monopoly power claim (not appealed here), the district court determined that plaintiffs failed to show significant market strength. The district court used this analysis in its findings on the market strength element of the tying claim.

[19] Although plaintiffs originally described the relevant market as the four-county area, they later attempted to redefine the relevant market to include only a few wells described as low deliverability, low reserve wells that were already connected to the Rodman system with low production so that none of defendants' many competitors were willing to invest the funds necessary to extend a line to them. The district court stated that "plaintiffs are saddled with their Complaint as filed in this Court." I Appellant's App. 269.

insufficient market definition as a matter of law. I Appellant's App. at 263 (citing *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 843 (D. Minn. 1989) ("courts have refused to define the relevant market as one encompassing only the defendant's product")); *accord Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986) ("A market drawn too tightly . . . creates the illusion of market power where none may exist."), *cert. denied*, 481 U.S. 1050 (1987).

The district court noted that the Rodman gathering system and the Rodman plant controlled less than ten percent of the Sooner Trend market. The court acknowledged that control of a small percentage of the relevant market is not considered per se insignificant market strength in this circuit. *Compare Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 968 (10th Cir.) ("market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power"), *cert. denied*, 497 U.S. 1005 (1990) *and Shoppin' Bag v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986) (other factors include number and strength of competitors, difficulty in entering the market, consumer sensitivity to price changes, market developments, and multimarketing by defendant) *with Colorado Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, [but] lower courts generally require a minimum market share of between 70% and 80%") (dictum), *cert. denied*, 498 U.S. 972 (1990). The district court then determined that plaintiffs failed to rebut the presumption that OXY and WNG's relatively insignificant market share did not constitute monopoly power. The court relied on evidence of other relevant factors; for example, that the four-county area was served by sixteen pipelines and gathering systems and thirteen gas processing plants,[20] and that plaintiffs themselves sold or transported gas in that four-county area through many companies, including Phillips Petroleum, Conoco, Exxon, and Texon. The district

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[20]Two miles was the distance that plaintiffs' expert identified as appropriate to measure competition.

court correctly determined that plaintiffs failed to establish defendants had sufficient strength in the relevant market; hence we affirm entry of summary judgment on the tying claim.

B
Conspiracy to Restrain Trade

Plaintiffs also assert that the district court erred in granting summary judgment on the § 1 claim of conspiracy to restrain trade. To recover on the conspiracy claim plaintiffs must establish a contract, conspiracy, or combination to unreasonably restrain trade. *See Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1571 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 2996 (1992). Plaintiffs' conspiracy claim essentially duplicates their tying claim, because here the alleged tying required both an agreement between the defendants as well as the fundamental "tied" agreement with the purchaser (plaintiffs). The district court found that plaintiffs did not present direct evidence of a conspiracy. In the absence of such direct evidence, we will not presume that conduct which is arguably consistent with legitimate business activity as well as an illegal conspiracy supports an inference of anticompetitive activity. Instead, the issue becomes whether plaintiffs presented evidence "'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Thus when evidence of conspiracy is ambiguous, we next ask if there is "any evidence that tends to exclude the possibility that the defendants were pursuing [permissible] independent interests." *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987). The district court found the inference of conspiracy was unreasonable because if WNG denied plaintiffs' transportation on the Rodman system it would have reduced WNG's profits. We agree and affirm the summary judgment on the conspiracy claim.

VII
Denial of CTR's Motion for Attorney's Fees on OXY's Counterclaim

Plaintiffs next assert that the district court erred in denying their motion for attorney's fees on OXY's counterclaim.

Oklahoma law provides that in a contract case "the prevailing party *shall* be allowed a reasonable attorney fee to be set by the court." Okla. Stat. tit. 12, § 936 (emphasis added). Plaintiffs requested attorney's fees, and they included two affidavits with their motion setting forth the hours, rates and total amounts billed by each attorney. Plaintiffs did not include billing statements in their motion and brief, although they did provide those to OXY; plaintiffs assert, however, that the fee request was apportioned among the various claims in the case and that they only requested fees for defense of the counterclaim. Without holding an evidentiary hearing, the district court denied the fee request in its entirety.

We review the district court's decision on attorney's fees for abuse of discretion. *See Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1338 (10th Cir. 1992); *Southwestern Bell Telephone Co. v. Parker Pest Control. Inc.*, 737 P.2d 1186, 1189 (Okla. 1987). The district court denied plaintiffs' fee request because it found that (1) plaintiffs failed to meet their burden of proving that the request was reasonable; (2) the request was "unreasonable," "duplicative," and "excessive," and (3) plaintiffs' counsel engaged in conduct suggesting, "bad faith and gross- neglect of professional duty." IV Appellees' App. 1312. The district court relied on cases endorsing the reduction of fees because of insufficient documentation. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1203 (10th Cir. 1986). We agree with plaintiffs that *Hensley* and *Mares* provide authority only for reducing fees and not for a complete denial of fees.

Plaintiffs point to our case of *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197 (10th Cir. 1988), in which the district court held no evidentiary hearing but found that a one-page affidavit was not substantial enough to support a claim for fees. We stated "the plaintiff is entitled to an opportunity to present evidence to support the claim." *Id.* at 1211 (applying Virgin Island law, where attorney's fee award is discretionary, to attorney's fee issue). An evidentiary hearing on the fee application is at least as important here where a reasonable fee award is mandated by statute.

We understand the district court's hesitancy to award attorney's fees if there was a strong likelihood that plaintiffs'

counsel included billing generated exclusively by the antitrust claims. But an evidentiary hearing provides a forum for the district court and defendants to resolve these concerns. It also seems an act of greed for plaintiffs to ask for attorney's fees on the counterclaim in view of the recovery they made on their tort claim. But the Oklahoma law speaks in mandatory language. Therefore, we hold that it was an abuse of discretion to deny all attorney's fees without holding an evidentiary hearing allowing plaintiffs to explain their claims. We remand for a determination by the district court of reasonable attorney's fees as required by the Oklahoma statute. It is axiomatic, of course, that "reasonable fees" include only those charges attributable to the contract claims.

Case No. 92-6350 is AFFIRMED. Case No. 92-6384 is AFFIRMED IN PART and REMANDED to the district court for determination of the attorney's fees issue.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CONTINENTAL TREND RESOURCES INC.; HAROLD G. HAMM, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; GARY H. WRIGHT; CINDY WRIGHT; JEFFREY B. HUME, FARRAR OIL COMPANY	)	
Plaintiffs - Appellees,	)	No. 92-6350
v.	)	D.C. No 90-1006-A
OXY USA, INC.,	)	
Defendant - Appellant,	)	
and	)	
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant.	)	
CONTINENTAL TREND RESOURCES INC.; HAROLD G. HAMM, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; GARY H. WRIGHT; CINDY WRIGHT; JEFFREY B. HUME; FARRAR OIL COMPANY,	)	
Plaintiffs - Appellants,	)	No. 92-6384
v.	)	D.C.No 90-1006-A
OXY USA, INC. and WILLIAMS NATURAL GAS COMPANY,	)	
Defendants - Appellees.		

ORDER
Entered April 6, 1995

Before SEYMOUR, Chief Judge, McWILLIAMS, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and BROWN*, District Judge.

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*The Honorable Wesley E. Brown of the United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of:

1. The petition for rehearing and suggestion for rehearing in banc filed by appellant/cross-appelle, Oxy USA, Inc.;

2. The response by appellees/cross-appellants;

3. Appellant/cross-appellee's motion for leave to reply to the response to the petition for rehearing;

4. The motion of The Chamber of Commerce of the United States of America for leave to file an amicus curiae brief;

5. The motion of the Washington Legal Foundation for leave to file an amicus curiae brief;

6. The motion of the American Petroleum Institute and Chemical Manufacturers Association for leave to file an amicus curiae brief.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc, the response thereto, and the amicus briefs were transmitted to all of the judges of the court who are in regular active service. The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Judges Baldock, Ebel, and Kelly voted to grant rehearing in banc. Judge Henry did not participate in consideration of the petition.

The motions to file amicus curiae briefs are granted. The briefs are ordered filed as of the date received.

Entered for the Court

PATRICK FISHER, Clerk

/s/Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, TRUSTEE OF THE HAROLD G. HAMM REVOCABLE INTER VIVOS TRUST; GARY H. WRIGHT; CINDY WRIGHT; JEFFERY B. HUME; and FARRAR OIL COMPANY,	)	
Plaintiffs,	)	No. CIV-
v.	)	90-1006-A
OXY USA, INC. and WILLIAMS NATURAL GAS COMPANY,	)	
Defendants.	)	

FILED
Oct. 20, 1992

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT, FOR REMITTITUR, FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL

I. INTRODUCTION

At issue are defendant Oxy USA Inc.'s ("Oxy") motion to alter or amend judgment, for remittitur, for judgment as a matter

of law ("JMOL") or for a new trial,* which is at issue upon briefs and after oral argument.

II. BACKGROUND

Plaintiffs are independent producers and marketeers of natural gas and liquid byproducts. Defendants process, market and transport natural gas. Defendant Williams Natural Gas Company ("WNG") owns and Oxy operates and maintains the Rodman Gathering System, which is a gas-gathering or collection and transmission pipeline system that distributes gas to intrastate and interstate markets. Defendant Oxy co-owns the Rodman Plant, which is at the outflow of the gathering system, with Oryx, a non-party to the present suit. Oxy solely operates and maintains the plant, which can perform compression and treatment of gas that may be necessary to meet the gathering system's transmission line quality specifications and pressure standards imposed by the Federal Energy and Regulation Commission ("FERC"). The transmission system is a regulated, non-discriminatory, open-access transporter of gas subject to FERC's gas tariffs.

This case was filed with both federal and pendent state claims.

On March 26, 1991, the Court denied plaintiffs' motion to bifurcate or abstain. *See Lis v. Robert Packer Hosp.*, 579 F.2d 819, 823-24 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978); *Organic Chems., Inc. v. Carroll Prods.. Inc.*, 86 F.R.D. 468, 469 (W.D. Mich. 1980). On April 17, 1991, the Court granted partial summary judgment to defendants Oxy USA, Inc. and Williams Natural Gas Company on plaintiffs' antitrust claims.

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*Defendants originally moved in part for judgment notwithstanding the verdict ("JNOV"), but on December 1, 1991, the motion was recharacterized pursuant to statute as a JMOL. *See* 28 U.S.C. Fed. R. Civ. P. 50(b) (revised, effective Dec. 1, 1991). This Order shall interchangeably refer to both procedural devices, but they are essentially the same. Likewise, at trial, defendants moved for a directed verdict, which has now also been recharacterized as a motion for JMOL. *See id.* at 50(a). Technically, at the post-trial stage the motion is simply renewed. *Id.*

See Continental Trend Resources, Inc. v. Oxy USA. Inc., No. Civ-90-1006-A, 1991 U.S. Dist. LEXIS 15203; 1991-2 Trade Cas. (CCH) ¶ 69,510 (W.D. Okla. Apr. 17,.1991). A jury trial was held from April 8-29,1991 on plaintiffs' claims of tortious interference with contracts and tortious interference with prospective business advantage, and Oxy's breach of contract counterclaims. The Court directed a verdict for defendant Williams Natural Gas Company at the conclusion of plaintiffs' case-in-chief. *See* Trial Transcript at 1662 (Apr. 23, 1991).

Following trial, the jury returned a unanimous verdict for plaintiffs for $269,000 in actual damages, and $30 million in punitive damages. Ironically, on the eve of jury selection, plaintiffs represented to the Court that it lacked jurisdiction to entertain pendent state claims because the Court had granted summary judgment to defendant on the federal claims. With a further note of irony, Oxy argued that plaintiffs were afraid to face their day of reckoning. Plaintiffs' motion to dismiss was denied by the Court and sanctions were awarded to defendant Oxy for having its litigation-preparation time disrupted by a last-minute motion that was absolutely meritless. In substantial part, defendant Oxy received the benefit of the majority of the Court's rulings, including ones overruling plaintiffs' objections to jury instructions. Consequently, plaintiffs had to overcome a rather heavy burden and had to convince eight jurors, two more than the legal minimum, that their claims were meritorious.

III. STANDARDS OF REVIEW FOR MOTIONS FOR JMOL OR JNOV, REMITTITUR, AND NEW TRIAL

"Motions for a directed verdict and for judgment n.o.v. are considered under the same standard." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498 (10th Cir. 1984). The standard was summarized by the Tenth Circuit in *Rajala v. Allied Corp.*, 919 F.2d 610 (10th Cir. 1990), *cert. denied*, 111. S. Ct. 1685 (1991). The test is whether there is evidence upon which the jury could properly find a verdict for the party opposing the motion for directed verdict or motion for JNOL or JNOV. *Id.* at 615.

In making that determination the court "may not weigh the evidence, pass on the credibility of witnesses, or substitute its

judgment for that of the jury," but rather "must view the evidence most favorably to the . . . [nonmoving] party and give that party the benefit of all reasonable inferences from the evidence." *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir. 1984); *accord, e.g., Sandlin v. Texaco Ref. & Mktg., Inc.*, 900 F.2d 1479, 1483 n.5 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990). "Jurors are charged with the exclusive duty of assessing the credibility of witnesses and determining the weight to be given testimony, taking into consideration the appearance and general demeanor of each and every witness." *Rasmussen Drilling Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978).

The Court may not substitute its judgment for that of the jury even if the Court may have reached a different conclusion had the case been tried solely to the Court. *See, e.g., Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 186 (8th Cir. 1972) (merely because the jury could have drawn different inferences or conclusions or because the court believes that another result is more reasonable is no basis for granting a new trial) (citing *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944)), *cert. denied*, 410 U.S. 930 (1973). "The jury—or the court if the case is tried without a jury—has the *exclusive* function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of facts." *Rasmussen Drilling Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d at 1149 (emphasis in original).

The motion for JMOL may not enlarge or assert new matters not presented in the JMOL urged at trial or the motion for directed verdict. *Id.* at 265; 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* at § 2537, p. 598 (1971) ("Since [the motion for JNOV] is technically only a renewal of the motion for directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for directed verdict.") (footnote omitted). One of the purposes of this rule is to allow the prevailing party the opportunity to correct deficiencies prior to the submission of the case to the jury. *Anderson v. United Telephone Co.*, 933 F.2d at 1503; *see generally Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826

F.2d 712, 716 (7th Cir. 1987) ("A party that fails to state its objection to jury instructions specifically cannot challenge the jury's verdict on that issue."); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1372, 1385 (10th Cir. 1989) (a specific motion for JMOL at trial or directed verdict is sufficient to preserve the issue of the sufficiency of the evidence to support a punitive damages award).

When considering the excessiveness of the amount of a damages award, the Court must determine whether it resulted from jury passion, bias or prejudice so as to taint the finding of liability. If such is found then a new trial is required; otherwise, any excessiveness may be cured through a remittitur within the sound discretion of the Court if the reduced amount is acceptable to plaintiff. *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1560-61 (10th Cir. 1991), *petition for cert. filed*, 1991 U.S. App. LEXIS 27,011 (U.S. Mar. 9, 1992); 11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* at § 2815 (1973) ("A remittitur gives the plaintiff a choice. He [or she] can refuse to accept the reduced amount of damages and instead proceed to a new trial."). The district court's ruling on a motion for directed verdict or for JMOL or JNOV is reviewed *de novo* by the Tenth Circuit, applying the same standard as that used by the district court. *Rajala v Allied Corp.*, 919 F.2d at 615; *Sandlin v. Texaco Ref. & Mktg., Inc.*, 900 F.2d at 1483 n.5; *Brown v. McGraw-Edison Co.*, 736 F.2d at 613.

IV. ANALYSIS

A. Denial of Motion for JMOL

Applying the JMOL standard to the facts in the record and carefully considering the briefs of the parties, the Court finds that the jury's verdict on plaintiffs' claims is rationally based, not driven by bias, prejudice or passion, or improper motive, and should stand. The Court previously assessed the sufficiency of the evidence at the directed verdict stage following plaintiffs' case-in-chief and found the evidence to be totally adequate as to Oxy with regard to the claims presented to the jury. The Court partially directed a verdict to Oxy with regard to some damage issues involving Exxon and Enogex. *See* Trial Transcript at 1666 (Apr. 23, 1991). The Court also fully directed a verdict

for defendant Williams Natural Gas Company. *See* Trial Transcript at 1662-66 (Apr. 23, 1991). At the close of all the evidence being introduced, the Court found that there was clear and convincing evidence of Oxy's misconduct. For the last time, the Court finds the evidence to be legally sufficient.

Procedurally, Oxy moved for a directed verdict at the end of plaintiffs' case in chief on April 22, 1991, but critically failed to reassert its motion at the end of all the evidence, and therefore the motion for JMOL cannot be successfully raised at the post-trial stage. *See Anderson v. United Tel. Co.*, 933 F.2d at 1502; *United States ex rel. Roper, IBG v. Reisz*, 718 F.2d at 1007; *Special Promotions, Inc. v. Southwest Photos, Ltd.*, 559 F.2d at 432; *see* advisory committee's note to former Fed. R. Civ. P. 50(b) ("A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence."). The motion is therefore deficient under both adjective and substantive measures.

B. Denial of Motion for New Trial

Oxy moves for a new trial based on the excessiveness of the punitive damages award and unfair surprise in that connection; misconduct of counsel; improper jury instructions; and surprise regarding the Mosier Farms contract. None of these arguments has merit.

The Court finds that Oxy has waived its First Amendment and Equal Protection Clause arguments by not pressing them at trial. *See Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1458 (5th Cir. 1987) ("[D]efenses not raised or argued at trial are ordinarily waived by the parties failing to raise them."); *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1518 (D. Kan. 1990) (failure to object on constitutional grounds is a waiver), *aff'd in part and modified in part, remanded for remittitur or new trial*, 948 F.2d 1546 (10th Cir. 1991), *petition for cert. filed*, 1991 U.S. App. LEXIS 27,011 (U.S. Mar. 9, 1992). There was no specific objection made by Oxy concerning a requisite element of falsity with regard to its commercial speech.

Oxy's speech was not the type of commercial speech as defined in *Virginia State Bd. of Pharmacy v. Virginia Citizens*

Consumer Council, Inc., 425 U.S. 748, 771 (1976) (price advertising); instead it was intended maliciously to interfere with legitimate commerce. Also, *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) does not support the limitation of an award of punitive damages against a corporation for tortious interference with contracts or prospective business advantage. Defamation is irreconcilable with the causes of action before this Court, because defamation has the potential of punishing unpopular ideas, which is abrasive to the Constitution. *Id.* Oxy has unpersuasively attempted to transpose First Amendment defamation law on to the law of tortious interference. Further, the attempt is imprecise at best because at issue here is a matter of purely private concern, which occupies a subordinate position on the scale of First Amendment values, and thus has reduced protection. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 & n.5 (1985). Punitive damages are supportable without a showing of actual malice in a purely private circumstance. *Id.* at 761.

Oxy's speech did not rise to the dignity of constitutional protection. In fact, certain utterances were tainted by fraud. The jury more likely than not found that Oxy fraudulently induced plaintiffs to enter certain contracts; other speech was malicious. *See Berry v. Stevens*, 166 Okla. 124, 124, 31 P.2d 950, 950 (1934) (per curiam) (Court's first syllabus) ("Fraud destroys the validity of everything into which it enters.").. .

Oxy's representative, Joe Garrett, repeatedly made oral and written communications to third-party gas purchasers designed to interfere with existing or prospective CTR Sales contracts, and threatened legal action if the third parties conducted any business with plaintiffs. The communications were less than truthful. The jury had substantial evidence before it from which to find that Joe Garrett intentionally failed to inform the third parties that Oxy was claiming an exclusive right to buy from plaintiff under terminated or expired contracts. Oxy provided to the third parties contracts in which Oxy was not a party and improperly asserted contractual rights under those contracts.

Under Oklahoma law when a person speaks there is a duty to disclose all known facts so as to not convey a false impression.

See id., 168 Okla. at __, 31 P.2d at 955; *see also Uptegraft v. Dome Petroleum Corp.*, 764 P.2d 1350, 1353-54 (Okla. 1988) (within context of a cotenancy); *Mulkey v. Morris*, 313 P.2d 494, 500 (Okla. 1957) (within context of a partnership). Oxy's representative breached this duty by not informing the third parties that: 1) Oxy had defrauded plaintiffs; 2) Oxy had improperly deducted gathering fees and thus materially breached certain contracts; and 3) Williams Natural Gas Company's contracts had been terminated, thereby automatically terminating Oxy's processing agreements. *See, e.g.*, Trial Transcript at 869-70 (Apr. 18, 1991); and 1669 (Apr. 23, 1991). Oxy also omitted other pertinent information that would have provided a complete and honest picture.

The Court further concludes that plaintiffs' counsel did not commit the degree of prejudicial misbehavior, including violation of this Court's Order in Limine regarding price-fixing litigation brought against Oxy by government agencies, that requires a new trial. Focused into perspective, this infraction was only a few words during a trial that spanned three weeks. The matter was stricken by the Court and the jury was admonished to disregard it. *See* Trial Transcript at 33 (Apr. 8, 1991); and 1463 (Apr. 23, 1991).

At trial, the Court twice made an offer to defendants to declare a mistrial on this issue, and twice Oxy argued that a mistrial was unnecessary. *See* Trial Transcript at 1418-19 (Apr. 22, 1991); and 1463-64, 1469-70 (Apr. 23, 1991). Oxy never offered any alternative remedy, except to request that the issue not be addressed any further in front of the jury. The Court granted that request and essentially gave Oxy everything for which it asked. Now, Oxy asks for more; in view of a particularly unpleasant verdict, Oxy believes that a new trial is necessary after all. This argument has now lost all force, and any defect that the Court might previously have been receptive to cure has long since been waived.

There was no objection to counsel's characterization of Oxy's witnesses, and the Court finds no error in this regard. The Court finds that the Mosier Farms contract claim was fairly contemplated within the Pretrial Order in the manner agreed to

by the parties. Oxy withdrew its objection at trial. The pertinent evidence was introduced on the first day of a trial that spanned three weeks. Plaintiffs' witnesses were thoroughly cross-examined and there was an attempted impeachment. No continuance was requested, and the Court rejects Oxy's claim of surprise. *See Marino v. Otis Eng'g Corp.*, 839 F.2d 1404, 1411 n.13 (10th Cir. 1988) (the cross- examination did not bear the marks of one who was surprised). Finally, Oxy produced evidence at trial that it had incurred lost profits and anticipated larger losses in the future, but the jury considered this evidence in reaching its determination. That determination need not be upset.

C. Due Process Safeguards

The jury award in this case meets the requirements of due process by three separate measures.

1. Application of Oklahoma's Statutory Procedure Requiring Redundant Scrutiny of the Evidence by Independent Triers of Fact that includes a Heightened Burden of Proof.

First, on the record at trial, the Court, found that there was clear and convincing evidence that showed Oxy was responsible for conduct evincing oppression and a wanton and reckless disregard of plaintiffs' rights. Consequently, the Court lifted the cap on punitive damages. Trial Transcript at 2068-69 (Apr. 25, 1991); *see* 23 Okla. Stat. § 9 (when jury may give exemplary damages). The Oklahoma Legislature has instituted this procedural safeguard to adequately insure that punitive damages awarded under state law are not excessive, and that ample due process safeguards are built into the judicial process. *See Marshall v. El Paso Natural Gas Co.*, 874 F.2d at 1382-84 ("In 1986 the Oklahoma legislature amended its punitive damages statute, 23 Okla. Stat. Ann. § 9 (1971), limiting the amount of punitive damages to the amount of actual damages awarded unless the court first should find clear and convincing evidence of punitive acts prior to submitting the issue to the jury, in which case the limit of punitive damages to actual damages would not apply.").

Under proper circumstances the district court can even set a cap beyond the amount of actual damages on the award of punitive damages. For example, in *John A. Henry & Co. v. T. G. & Y. Stores Co.*, 941 F.2d 1068, 1070, 1073 (10th Cir. 1991), the Tenth Circuit recognized a wrongful interference with contract claim that arose from this district. The trial court lifted the cap, but placed a $2 million limit on punitive damages. The jury returned a verdict of $100,000 for actual damages and $2 million for punitive damages, a 1:20 ratio. In rejecting defendant's argument that the trial court invaded the province of the jury by setting a certain limit on the award, the Tenth Circuit concluded by stating "[w]e see no error or improper suggestion in this form. If any prejudice occurred, it was to [plaintiff] because the jury was not permitted to exceed the $2,000,000." *Id.* at 1073.

The Court believes that the Oklahoma statutory framework is constitutional and is not in need of change; however, if any change to this scheme is found to be warranted, then it should be by the state legislative branch, and not by the judiciary. *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1384 n.12 (5th Cir. 1991) (on remand from the Supreme Court for reconsideration in light of *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991), and noting that it is up to the legislature to set forth exact proportionality guidelines for punitive damage awards); *compare Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991) (finding statute similar to that of Oklahoma was constitutionally adequate) *with Fleming Landfill. Inc. v. Garnes*, 413 S.E.2d 897, ___, No. 20284, 1991 W. Va. LEXIS 215, 1991 WL 258826 (W. Va. Feb. 13, 1992) (as corrected) (adopting into West Virginia law the punitive damages factors noted in *Pacific Mutual*).

Had the Oklahoma Legislature wanted to place an arbitrary cap on punitive damages to cover every conceivable circumstance, then it might have done so. Instead, there was a purposeful legislative decision to keep the ceiling open-ended. Consequently, higher punitive damages may be awarded when warranted by the facts in light of the state's purposeful interest in individualized assessment of appropriate deterrence and punishment. *See Mason v. Texaco, Inc.*, 948 F.2d at 1559

(citing *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043-44).

Another procedural safeguard under Oklahoma law is there can be no award of punitive-damages without recovery of actual damages. *Phillips Mach. Co. v. LeBlond, Inc.*, 494 F. Supp. 318, 325 (N.D. Okla. 1980) (citing *Moore v. Metropolitan Utils. Co.*, 477 P.2d 692, 694 (Okla. 1970)). (However, punitive damages may be awarded in the event nominal damages are obtained. *See Spaeth v. Union Oil Co.*, 762 F.2d 665, 866-67 (10th Cir. 1985) (appeal after remand), *cert. denied*, 476 U.S. 1104 (1986)).

In determining the punitive damages issue at trial, the Court, in its role of trier of fact, objectively weighed the evidence, judged the credibility of the witnesses and assigned them weight. The Court determined that plaintiffs met their burden of proving by clear and convincing evidence that Oxy oppressively and recklessly disregarded plaintiffs' rights, so as justify lifting the punitive damages cap. *See* Trial Transcript at 2068-69 (Apr. 24, 1991). Subsequently, the jury, in its separate role of trier of fact, independently found by a preponderance of the evidence that Oxy tortiously interfered with plaintiffs' contracts and further tortiously interfered with plaintiffs' business relations with others. The Court reject's Oxy's argument that this procedure may infringe on its right to a trial by bury. The jury consequently awarded punitive damages. *See Marshall v. El Paso Natural Gas Co.*, 874 F.2d at 1382-84 (setting forth the statutory framework for determining punitive damages in Oklahoma). There was substantial evidence to justify the jury's determination.

The Court is mindful that punitive damages are not wholly favored in the law because they constitute a windfall and may create the anomaly of excessive compensation, *see Las Palmas Assocs. v. Las Palmas Center Assocs.*, 235 Cal. App. 3d 1220, 1258, 1 Cal. Rptr. 301, ___ (Cal. App. Nov. 5, 1991), *review denied*, 1992 Cal. LEXIS 752 (Feb. 11, 1992), but punitive damages are deeply rooted in our legal system and if they are to serve their mission, then they should not be absorbed with little or no discomfort. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S.

238, 255 (1984); *see also Coryell v. Colbauch*, 1 N.J.L. 77 (1791) (first reported American case involving punitive damages). Even a multi-million dollar punishment may be viewed as a calculated risk by a huge corporation in the seedy politics of coercion of smaller businesses that cannot financially risk litigation despite a sincere belief that they have been wronged. In contrast, a judgment of $30 million against this defendant under the justifying circumstances of this case sends a sharp, but certainly not devastating, lesson of deterrence to this defendant and any other potential defendant who is like-minded and similarly situated.

2. Well-Drawn Limits on Jury Discretion.

Second, the discretion of the jury was sufficiently tempered by the Court's purposefully crafted instructions. The jury's discretion in setting punitive damages was not unlimited, and was instead confined to deterrence and retribution. *See Heideman v. American Family Ins. Group*, 163 Wis. 2d 847, ___, 473 N.W.2d 14, 23 (App. 1991) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1044). The Supreme Court has stated in pertinent part:

> The discretion . . . is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied.

Pacific Mut. Life Ins. Co. v. Haslip, ___ U.S. at ___, 111 S. Ct. at 1044.

The eight-person jury—two more than legally required—deliberated for a day and a half, and on April 30, 1991 returned a unanimous verdict for plaintiffs for $269,000 in actual damages, and $30 million in punitive damages. The jury was attentive during trial and approached its job seriously, as demonstrated by the fact that at one point during deliberations the jury requested to see the blow-ups of certain exhibits, and additionally asked to view certain depositions. *See* Trial

Transcript at 1352 (Apr. 23, 1991). The jury's conduct and demeanor in the Court's view, were inconsistent with any exhibitions that would suggest passion or prejudice. To the contrary, the jurors were calm and rational. There is a strong presumption, unless there is evidence in contradiction, that the jury followed the Court's instructions in reaching its verdict. *See Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d at 1149, 1155 ("Appellate courts do not impute to a jury the inability to understand correctly the totality of the trial court's instructions, even in a complicated case, nor will courts impute nonfeasance, in the form of disregard of the trial court's instructions, to a jury. . . . It is presumed that jurors will be true to their oath and conscientiously observe the instructions and admonitions of the Court.").

The Court instructed the jury that plaintiff must show that the acts complained of were oppressive, wanton, or malicious. Jury Instruction No. 41 at 1 (Punitive Damages). Maliciousness was defined as being prompted or accompanied by hatred, ill will, or spite toward the injured person individually. Wantonness was defined as an act done in a reckless or callous disregard of, or indifference to, the rights of the injured party. Oppressiveness was defined as an act that injures, damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, disability or misfortune of another person. *Id.* at 1-2.

The jury was cautioned that punitive damages were not to be construed as compensation to the prevailing party, but rather as punishment for misconduct and to serve as an example to others to deter them from similar conduct. *Id.* at 1. The Court instructed the jury that they *may* award punitive damages, but if so then only with sound reason and calm discretion, and not on the basis of sympathy, bias or prejudice. *Id.* at 2. In instructing on damages in general, the Court emphasized that any award must be just and reasonable, and not speculative, but instead must be based on the evidence introduced. Jury Instruction No. 36 at 2 (Damages). The Court took away from the jury those portions of plaintiffs' claims where the damages were too speculative or unwarranted. *See* Trial Transcript at 288-89 Apr.

12, 1991); 1365-68 (Apr. 22, 1991); and 1676, 1680 (Apr. 24, 1991). Further, the jury was instructed that punitive damages must bear some relationship to the injury caused by the offensive conduct as well as the conduct itself, but did not necessarily need to bear any relationship to the amount of actual damages awarded. Jury Instruction No. 41 at 2.

The Court believes that its handcrafted deliberation instructions placed meaningful procedural due process constraints on the discretion of the jury to award excessive punitive damages. *See Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___ & n.1, 111 S. Ct. at 1037 & n.1; *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097-99 (5th Cir. 1991) (the requirements are limits on jury discretion and adequate post-trial review), *petition for cert. filed*, 1991 U.S. App. LEXIS 29,573 (U.S. Feb. 28, 1992). Oxy argues that its constitutional rights were abridged by the punitive damages instruction, but the Court agrees with plaintiffs that this argument has a bit of crocodilian flavor since Oxy was willing to use the same instruction to its advantage with regard to its conversion counterclaim that was dismissed by the Court at trial. *See* Trial Transcript at 1986, 2045 (Apr. 25, 1991); Oxy's Proposed Jury Instructions at 125, 137 (Mar. 6, 1991).

3. Post-Trial Intensive Review.

Third, the Court has conducted this post-trial review of the award and finds it to be well-grounded in the evidence and not excessive under all of the circumstances; and it is reasonable in consideration of the character and degree of Oxy's wrongdoing, and the necessity of preventing similar conduct by not only this defendant but by others as well. *See Adams v. Murakami*, 54 Cal. 3d 105, ___, 813 P.2d 1348, 1352, 284 Cal. Rptr. 318, 322 (1991) (en banc) ("'The channeling of just the correct quantum: of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences.'" (quoted citation omitted)).

a. Reasonableness of Award.

There are four factors to consider in determining the reasonableness of an award of punitive damages under Oklahoma law. These factors shall be analyzed in turn.

i. The Award is justified by the Cause and Extent of Plaintiffs' Injury.

The first factor to consider in determining reasonableness is the cause and extent of plaintiffs' injury. *See Hobbs v. Watkins*, 481 P.2d 746, 754 (Okla. 1971); Trial Transcript at 1370-77 (Apr. 22, 1991); and 1560-65 (Apr. 23, 1991). In this case there was a purely commercial injury. Plaintiffs' cause of action were for tortious interference with existing contracts and tortious interference with prospective business relations. Both of these actions have contractual origins, but tortious misconduct was at work. Plaintiffs claim that their business was almost totally decimated by Oxy. *See* Trial Transcript at 283-84 (Apr. 12, 1991). The jury had evidence before it to find that Oxy deliberately shut-in plaintiffs' livelihood, and was less than truthful to third parties when plaintiffs attempted to conduct business with them. *See, e.g.*, Trial Transcript at 260, 282-83 (Apr. 12, 1991); 694 (Apr. 17, 1991); 1231, 1234-35, 1237, 1242 (Apr. 19, 1991); and 2054 (Apr. 25, 1991).

The jury had to find that Oxy's conduct was oppressive, wanton or associated with ill will or spite toward plaintiffs. *See* Jury Instruction No. 41 at 1 (Punitive Damages). Oxy's behavior had to be found to be reckless or with callous disregard and indifference to the rights of plaintiffs. The jury had to find that Oxy intentionally and maliciously induced third parties to either fail or to refuse to perform contracts with plaintiffs, or find that Oxy otherwise intended to deprive plaintiffs of their expected benefits under the contracts. *See* Trial Transcript at 2052 (Apr. 25, 1991); Jury Instruction No. 21 at 1 (Interference With Existing Contract- Third Element).

The jury found that Oxy's conduct lacked justification, privilege or excuse when they found the counterclaim devoid of merit. *See* Jury Instruction Nos. 21 at 2-3 and 23 at 1 (Elements of Liability for Plaintiffs' Second Claim of Interference With Prospective Contractual Business Relations). The jury particularly had to find in this regard that Oxy did not have an

honest intent and purpose of fairly bettering its own business, but instead found Oxy's purpose was to harm plaintiffs or wrongfully destroy honest competition. *See* Jury Instruction No. 21 at 1. The jury additionally had to find that Oxy did not have a legitimate economic interest in the subject matter of the relevant contract nor was Oxy seeking to protect its own contractual rights that might have been equal to or superior to the rights of plaintiffs. *See id.* at 3. The jury further had to conclude that Oxy's behavior was improper after balancing the evidence concerning the nature of the conduct, Oxy's motives, the interests interfered with, the interests sought to be advanced by tee interference, the social interests served by protecting either party's interest, the relationship between the parties, and the proximity or remoteness of Oxy's conduct to the disruption of the subject contracts. *See id.*

The Court rejects Oxy's argument that it was unduly surprised by plaintiffs' cause of action for tortious interference of prospective business advantage, which Oxy argues is relatively new in Oklahoma. No legitimate business would consider Oxy's conduct to be proper—certainly plaintiffs did not think it so and if Oxy is suggesting that it would have reformed its misbehavior had it known it might be susceptible to a significant punishment, then that is precisely the point that must be conveyed to deter others. *See* 76 Okla. Stat. § 1 ("Every person is bound, without contract, to abstain from injuring the person or property of another, or fringing upon any of [another's] rights."); *Restatement (Second) of Torts*, § 766B (1989) (Interference With Prospective Contractual Relations).

On the counterclaim that made it to the jury, Oxy claimed a $4 million economic loss based on its purported contractual rights to receive casinghead gas from plaintiffs' wells, which plaintiffs attempted to sell to third parties. Had Oxy prevailed on its counterclaim, then it would have had a complete defense to plaintiffs' claims. However, when plaintiffs' claims and Oxy's counterclaim are superimposed, the failure of proof on the counterclaim proves Oxy's injurious motive in a most convincing way. The jury was entitled to react to the fact that Oxy took a complete change of position with respect to the coterminous provisions of the contracts and whether the contracts retained

validity. *See, e.g.*, Trial Transcript at 231-32 (Apr. 12, 1991); 658 (Apr. 16, 1991); 1228, 1242-43 (Apr. 19, 1991); and 2047-48 (Apr. 25, 1991). The counterclaim thus became counter-productive and was no doubt found to be offensive because Oxy asserted contractual rights under contracts that the jury probably found were procured by fraud in the first instance. *See, e.g.*, Trial Transcript at 2048-49, 2051 (Apr. 25, 1991); and at 30-31 (Sept. 13, 1991). Plaintiffs showed that Oxy failed to perform material obligations set forth in the contracts, including failure to pay for the gas taken, and improperly charged a gathering fee. *See. e.g.*, Trial Transcript at 283 (Apr. 12, 1991); 661 (Apr. 16, 1991); 2048 (Apr. 25, 1991); Jury Instruction No. 28 at 1-3 (Oxy's Breach Of Contract Counterclaim-Agreements And Issues Involved). After thoughtful consideration, the jury absolutely rejected Oxy's counterclaim. The jury had substantial evidence before it to find by clear and convincing evidence that Oxy fraudulently induced plaintiffs into entering certain contracts with regard to the Mosier wells. *See* Jury Instruction Nos. 34 & 35.

No where in its extensive briefing has Oxy suggested that the jury reached the wrong result on its counterclaim. What surfaces is the disturbing conclusion that plaintiffs not only had to risk substantial legal costs to bring this suit, but were also faced with the possibility of a multi-million dollar adverse judgment on Oxy's counterclaims, which proved to be meritless. Just prior to trial, Oxy had been seeking nearly 7 million dollars in damages from plaintiffs. *See* Trial Transcript at 1855-56 (Apr. 24, 1991). Oxy was also pursuing its rights under terminated contracts in state court. *See id.* at 1789. Such tactics by a powerful tortfeasor serve to freeze all but the most intrepid of wronged parties. *See Spaeth v. Union Oil Co.*, 762 F.2d at 866 (the risk created by defendant's conduct is a substantial factor to consider in calculating punitive damages); *O'Gilvie v. International Playtex. Inc.*, 821 F.2d 1438, 1447 (10th Cir. 1987) (probable litigation expense may be factored into the punitive damages calculus) (citing Kansas law), *cert. denied sub nom.*, *Playtex Holdings Inc. v. O'Gilvie*, 486 U.S. 1032 (1988). It is fundamentally fair and just that this risk factor should be taken into account when assessing the totality of Oxy's conduct.

Finally, there was substantial evidence of the injury to plaintiffs caused by Oxy's conduct. The evidence showed that the injury was manifested in significant delays by third parties in hooking up to plaintiffs' wells, causing substantial damages to plaintiffs. For instance, Gary Baker testified that Oxy's conduct caused Union Texas to not buy plaintiff Continental Trends' gas, and Joe Garrett's tortious contact caused Union Texas to delay in purchasing Farrar Oil Company's gas. *See. e.g.*, Trial Transcript at 1301 (Apr. 22, 1991); and 2053-54 (Apr. 25, 1991). Other delays were caused as well. *See e.g., id.* at 1334-35, 1337 (Apr. 22, 1991). There was substantial evidence that Oxy shut-in plaintiffs' wells. *See. e.g., id.* at 245, 247, 257, 258 (Apr. 12, 1991); 673 (Apr. 16, 1991).

At trial, Oxy admitted to making mistakes; otherwise Oxy has been utterly remorseless. *See id.* at 2049, 2061 (Apr. 25, 1991). Coercing weaker competitors to keep them in their place was Oxy's method of conducting business. *See. e.g., id.* at 1231 (Apr. 19, 1991). There is no question that plaintiffs proved defendant Oxy's injurious motive. The jury was obviously moved by the repugnancy of the totality of Oxy's conduct. The circumstances therefore beg the question: exactly how many tens of millions of dollars requite Oxy's incorrigibility? The jury answered three. This Court cannot disagree with that assessment.

ii. The Award Is Justified by the Harm Caused to Society.

The second factor to consider in determining the reasonableness of a punitive damages award is the harm Oxy's conduct caused to society in general. *See Oller v. Hicks*, 441 P.2d 356, 360 (Okla. 1967) ("The basis for allowance of punitive damages rests upon the principle that they are allowed as punishment for the benefit of society as a restraint upon the transgressor, and a warning and example serving as a deterrent to commission of like offenses in the future."). The jury found that Oxy's intent was to improperly injure plaintiffs and thus wrongfully destroy honest competition. *See* Jury Instruction No. 21 at 3. It was therefore proper that the jury made an example out of Oxy in order to deter others from such grievous behavior

that ultimately has an adverse economic impact on the public—the ultimate consumer of vital energy resources through public utilities.

At the same time, Oxy's conduct incrementally damages the United States in its present struggle to remain a global economic power. Of course, Oxy is not itself the cause of our society's economic problems, but Oxy's punishment does serve as an example to others to restrain them from crossing the boundary of unlawful interference and suppression of free enterprise. Our economic system's structure is as endangered by the nature of Oxy's conduct as by wrongful deaths or environmental hazards that Oxy insists should be reserved for the highest penalties. It is true that Oxy's conduct does not create the personal tragedy represented in those other species of torts, but from a macro-perspective Oxy's misconduct is insidious because it rips at fair competition itself.

iii. The Award Is Justified by Oxy's Profit Incentive.

The third factor to consider is the magnitude of Oxy's profit incentive. Oxy itself introduced evidence that suggested that its profit incentive was in excess of $4.25 million. Plaintiffs argue that this amount does not include the gas that plaintiffs were unable to move from the system and were forced to process at the Rodman Plant due to Oxy's malicious interference. Plaintiffs contend that Oxy stood to ultimately profit by approximately $10 million from its unlawful conduct at the subject gas-processing plant, and therefore the award exceeds that amount by no more than three times. But, Oxy could only directly profit by a factor of 50% of the total amount as Oxy had a co-owner, Oryx. Therefore a more accurate multiplier would be six. However, the benefits that Oxy indirectly realized by unjustly enriching its co-owner defy quantification.

The evidence additionally suggests that Oxy improperly deducted gathering fees in the tens of millions of dollars. *See. e.g.*, Trial Transcript at 2048 (Apr. 25, 1991). Plaintiffs argue that Oxy's misconduct not only placed their business on the verge of collapse, but there was evidence that Oxy unjustly treated other producers in a similar manner and profited by

millions of dollars. There is evidence that 6,000 contracts were affected, involving 100,000 producers. *See, e.g.*, Trial Transcript at 1756 (Apr. 24, 1991).

If left unchecked, Oxy could have profited by $80-90 million by the year 2010, according to plaintiffs. The large number of independent producers potentially affected therefore further substantiates a significant punitive damages award. *See O'Gilvie v. International Playtex, Inc.*, 821 F.2d at 1447; *Silkwood v. KerrMcGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986). This potentially widespread injury was a reasonable inference for the jury to draw from the evidence. Oxy disputes plaintiffs' ultimate conclusions, but the burden falls on Oxy with regard to overturning the jury award and that burden has not been met. "A verdict awarding punitive damages is not considered to be unconstitutionally excessive until the defendant against whom it has been rendered produces evidence that the amount is greater than a sum necessary to accomplish society's goals of punishment and deterrence." *Fraser v. Reynold's*, 588 So. 2d 448, 452 (Ala. 1991).

Oxy's corporate representative at trial, Joe Garrett, was not a strategic asset with respect to Oxy's culpability. In fact, the evidence admitted at trial portrayed both the representative and Oxy in a particularly bad light. *See* Trial Transcript at 31 (Sept. 13, 1991). Significantly, there was evidence that Oxy's representative believed, in effect, that Oxy could not allow plaintiff Continental Trend to get away with asserting its rights, or everybody else would try to assert theirs. Garrett specifically testified: "We have approximately 500 or so contracts at Rodman, and we live by the contracts that we sign with producers. *And if we let this happen with one producer, we could expect for everybody to want to jump right in the middle of us and do the same thing.* So we were trying to protect our plant." Trial Transcript at 1789 (Apr. 24, 1991) (emphasis supplied).

The indelible impression was that Oxy was concerned that the producers were getting restless; and therefore Oxy believed that it better get out there and subdue them, and did. The Court observed the jury during Joe Garrett's testimony and it was clear

that the jury viewed him with justifiable disapprobation. *See* Trial Transcript at 30 (Sept. 13, 1991) (hearing on motions). The jury could well conclude that intimidation was Oxy's method of controlling competitors. Oxy's representative might have single-handedly assured a substantial punitive damages award against Oxy. After his testimony, Oxy's representative, who sat at counsel table, was a constantly visible symbol of corporate misconduct, especially so during the final week of trial while a parade of witnesses testified as to his own misconduct. *See id.* at 30-31.

iv. Oxy's Wealth Substantially Justifies the Award.

The last factor for the Court to consider in determining the reasonableness of the punitive damages award is Oxy's wealth. *See generally*, Annotation, *Punitive damages: relationship to defendant's wealth as factor in determining propriety of award*, 87 A.L.R. 4th 141, § 31 (1991) (Net worth of assets of $1 billion or more.). Based on an equal protection foundation, Oxy argues that the jury should not have even been allowed to consider its net worth at the liability stage. Plaintiffs moved for bifurcation on Oxy's counterclaim, but Oxy never once asked for bifurcation, which would have been a rudimentary step for preserving an equal protection objection. *See Smith v. Lightning Boit Prods., Inc.*, 861 F.2d 363, 373-74 (2d Cir. 1988).

On March 6, 1991, Oxy did file a motion in limine to exclude evidence of its parent corporation's net worth from being introduced, and to exclude evidence of its own financial position and condition *until after plaintiffs proved a prima facie showing of liability*. It was Oxy's position that such evidence was not even discoverable until liability was established. During the pretrial conference on April 1, 1991, the Court stated that it did not have enough information to make a decision at that time on the motion in limine and would simply defer an examination of punitive damages until after a liability determination. However, as a practical matter the motion was essentially granted because plaintiffs not only made a prima facie showing of liability, but after hearing arguments the Court found such by clear and convincing evidence in the record on April 25, 1991.

See Trial Transcript at 2046-69 (Apr. 25, 1991). Thereafter, the Court ordered Oxy to produce evidence of its net worth by the following day. *See* Trial Transcript at 2069-70 (Apr. 25, 1991).

The Court rejects on the merits Oxy's contention that its right to equal protection was compromised by the jury being informed of its net worth at the liability stage. While Oxy argued in its motion in limine that such evidence would be prejudicial, there was no argument that it should be excluded on the constitutional grounds of equal protection nor excluded prior to the jury's verdict on liability. The basic issue raised is whether the jury would be unduly prejudiced by learning of the vast wealth of Oxy and then consequently return an adverse verdict on liability. This argument loses much of its force in the oil and gas context of the present suit, which is essentially a dispute between sophisticated business entities. A defendant's wealth in this context plays a decisively less prejudicial role than in such contexts, for example, as a manufacturer's product liability case where greed has perhaps placed profits above concerns for life and limb.

Oxy's argument is also curious on a logical plane. In effect, Oxy must convince this Court that the jury found liability on a preponderance standard, incited by prejudice, when this same Court previously determined that there was clear and convincing evidence of liability for punitive damages without the benefit of the evidence that Oxy asserts is so prejudicial. *See* Trial Transcript at 2069 (Apr. 25, 1991). In sum, the Court simply does not find that a constitutional right was abridged in this regard. *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981). Again, this fundamental matter is best left to the legislature to change, if indeed, any change is warranted. Oxy likewise failed to raise this issue at trial and a party may not withhold assertion of a trial error and then urge the error upon review if the verdict proves unfavorable. *See Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (error should be raised in a "pragmatically sufficient time."); *Nanda v. Ford Motor Co.*, 509 F.2d 213, 222 (7th Cir. 1974); *Skogen v. Dow Chem. Co.*, 375 F.2d 692, 703 (8th Cir. 1967) ("It is the most fundamental rule of appellate procedure that a party may not sit idly by and allow the trial court to commit

error, wait for a verdict, and complain of the error only if the verdict is unfavorable."), *superseded by statute on other grounds*.

The jury was correctly instructed that it could consider defendant's net worth pursuant to Oklahoma law as one of many factors in determining the amount of punitive damages to award, but the award must be warranted by the evidence. *See Spaeth v. Union Oil Co.*, 710 F.2d 1455, 1460 (10th Cir. 1983), *appeal after remand*, 762 P.2d 865 (10th Cir. 1985); *cert. denied*, 476 U.S. 1104 (1986). Oxy failed to raise a contemporaneous objection based on any lack of specificity in the instructions and further failed to submit a more detailed instruction that it now insists was required. *See* Oxy's Proposed Jury Instructions at 125, 137 (Mar. 6, 1991). Oxy's objection has simply been waived on this point. *See Rogers v. Northern Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978) ("It was only after an adverse jury verdict was returned that the matter assumed great importance . . . ."); Fed. R. Civ. P. 51 (objections to jury instructions must be requisitely specific).

In reviewing instructions, the court should " ' " ' "consider all that the jury heard and, from the standpoint of the jury, decide, "not whether the charge was faultless in every particular, but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to determine th[o]se issues." ' " ' " *Estate of Korf v. A.O. Smith Harvestore Prods.*, 917 F.2d 480, 484 (10th Cir. 1990) (per curiam) (quoting *Robinson v. Audi NSU Auto Union Aktiengesellschaft*, 739 F.2d 1481, 1486 (10th Cir. 1984) (quoting *Durflinger v. Artiles*, 727 F.2d 888, 895 (10th Cir. 1984) (quoting *Alloy Int'l Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226-27 (7th Cir. 1980) (and in turn quoting *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974))))). The review must be made " ' "in the light, not only of the instructions as a whole, but of the allegations of the complaint, ;the opening statements, the evidence, and the closing arguments." ' " *Estate of Korf v. A.O. Smith Harvestore Prods.*, 917 F.2d at 484 (quoting *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682 (10th Cir. 1981) (in turn quoting *Alloy Int'l*

Co. v. Hoover-NSK Bearing Co., 635 F.2d at 1226)). The instructions withstand review.

Significantly, Oxy never gave the Court any notice at trial of the problem of which it now complains nor the opportunity to correct any perceived error. *See Taylor v. Denver & Rio Grande W. RR. Co.*, 438 F.2d 351, 253 (10th Cir. 1971) (the purpose of Rule 51 is to prevent a litigant from taking advantage of an error that could have been rectified if brought to the court's attention). During closing arguments, Oxy was permitted the opportunity to argue what other factors the jury might consider in reaching their determination. Opportunity once lost is forever lost. If any error is detectable, then it is harmless; so too with the Court's refusal to instruct on Oxy's theory of its case. *See* Fed. R. Civ. P. 61 (harmless error doctrine).

Oxy's net worth is a substantial factor for the jury to consider in determining the amount of punitive damages. *See Spaeth v. Union Oil Co.*, 762 F.2d at 866. In this regard, Oxy is a subsidiary of a giant American corporation—OXY Oil and Gas USA, Inc., which had a net worth of $1.756 billion in 1990 according to plaintiffs' Exhibit No. 256. Oxy's grandparent corporation, Occidental Petroleum Corporation of Los Angeles is reputed to be one of the Top Ten oil companies in the nation. *See generally*, Ronda Fears, *OXY Judgment May Be Largest In State History*, The Journal Record, May 3, 1991, at 1 (located at Oxy's brief at Ex. B). The financial worth of a parent corporation is generally irrelevant in assessing punitive damages on a subsidiary unless the corporate veil is pierced. However, as a practical matter, it was Oxy that pierced its parent's corporate veil by introducing evidence that commingled Oxy's financial information with that of its parent.

Oxy submitted a belated net worth statement that was introduced *without objection*. That report indicated that in 1990 Oxy distributed $589 million of excess cash and $3.9 billion in assets to its parent corporation. The evidence indicated that Oxy's revenue for one week was $36 million. *See* plaintiffs' Ex. 256. During closing arguments, plaintiffs' counsel argued that Oxy should be penalized one week's revenue for its insufferable

conduct. The jury apparently accepted that argument and the result is just and rationally based. In light of all of the circumstances of this case, the Court cannot find the sum of $30 million to be unreasonable, nor grossly disproportionate to the severity of the offense, and the sum is especially reasonable in relation to the $6 billion in assets of defendant in 1989 before it distributed $4 billion to its parent in 1990—the year this case was filed. *See id.*

Oxy has attempted to introduce evidence at this stage to show that the evidence presented at trial was misleading and confusing with regard to its net worth. The Court has reviewed this proffered evidence, but it more properly should have been introduced at trial under the Oklahoma punitive damages framework so that it could be subjected to cross-examination and consideration by the jury. *Cf. Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1044-45 (noting with approval that under Alabama law evidence of net worth is considered at the post-trial stage and upon appellate review, as opposed to the trial stage). The evidence of Oxy's net worth admitted at trial was not only uncontroverted, but there was no evidence proffered by Oxy at trial that plaintiffs' evidence in any form exaggerated Oxy's net worth. *See* Trial Transcript at 2075 (Apr. 25, 1991). Oxy allowed the strategic opportunity to introduce evidence on its financial condition to pass by. *See Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 408-09 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

Oxy unreasonably failed to produce evidence of its net worth when it was repeatedly requested by plaintiffs during discovery, and this infraction surfaced during trial. Consequently, the Court ordered Oxy to immediately produce the information, and it was produced the following day. Now, Oxy argues for the first time that it was prejudiced by this requirement, but Oxy's wound was self-inflicted. Oxy argues that it was the Court's change of position on the timing of submission of damage evidence to the jury that resulted in a lack of preparation to present evidence of its net worth. However, as detailed above, the Court deferred examining punitive damages with regard to Oxy's motion in limine until after a prima facie liability determination. Therefore, it was Oxy's decision to not comply

with plaintiffs' discovery request on a reasonable basis that led to the vexation from which Oxy now claims it is afflicted. It is disingenuous in a trial of this magnitude for Oxy to feebly argue that its total lack of preparation to present evidence on punitive damages hinged on a ruling that the Court expressly stated that it did not have enough information on which to make a decision. Significantly, upon hearing the Court's ruling, Oxy did not request a continuance or make any other attempt to cure the alleged prejudice. *See Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 7.2d at 1154-55 (an appellant may not complain of errors that the appellant induced or invited).

Oxy's stratagem backfired, and any resultant damage was aggravated by Oxy's decision not to introduce any other evidence at trial with regard to its net worth, nor even address the issue during closing arguments. Oxy must now live with the consequences of its choices. *See Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d at 373-74 (it is defendant's burden to produce evidence of its financial worth and failure to do so does not warrant reduction of punitive damages). The trial, which spanned three weeks, was not merely a dress rehearsal for Oxy to correct defects in its trial strategy that went awry.

In consideration of the defendant's net worth, the Court concludes that a substantial sum of punitive damages is reasonably necessary to deter future misconduct of this particular defendant. In this light, *under all of the circumstances of this case*, and *in this particular context* $30 million is still well short of the line of being such an extreme result as to jar this Court's constitutional sensibilities. *See Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043, *cited in, Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 88 Md. App. 672, ___, 596 A.2d 687, 705 (Md. Ct. Spec. App. 1991); *Spaeth v. Union Oil Co.*, 710 F.2d at 1460 ("Absent an award that shocks the judicial conscience, the jury's determination of punitive damages is inviolate.").

b. Finding of a Lack of Excessiveness.

In *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1046, there was an award of $4,000 in actual damages for the deprivation of benefits under a life insurance policy, and

the ratio to punitive damages was 1:4; however, the Supreme Court also made an effort to note that the actual out-of-pocket expenses for purchasing the insurance compared to the punitive damages award approached a ratio of 1:200. Regarding these ratios the Supreme Court stated that "[w]hile the monetary *comparisons* are wide, and indeed, may be close to the line, the award here did not lack objective criteria." *Id.* (emphasis supplied). However, the Supreme Court wisely refused to find a "mathematical bright line" test of constitutionality. *Id.* at 1043. The Supreme Court correctly did not set forth an arbitrary rule of proportionality, and *expressly limited its review of the constitutionality of damages to the facts of the case before it. See Heideman v. American Family Ins. Group*, 163 Wis. 2d at ___, 473 N.W.2d at 22 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043). The Supreme Court emphasized:

> "We need not, and indeed, we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."

Ober v. Honda Motor Co. Ltd., 108 Or. App. 43, __, 814 P.2d 517, 522 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043) (emphasis omitted), *review granted*, 312 Or. 525, 822 P.2d 1194 (1991); *see generally*, Francis N. Dougherty, Annotation, *Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death*, 35 A.L.R. 4th 538, 598-607 (1985) & Supp. at 53-56 (1991) (Interference with business or business rights.).

A careful scrutiny of the ratio of actual damages to punitive damages is an objective starting point for determining the waterline of excessiveness, but a close ratio does not necessarily prove adequate in cases such as this one that are marked by extraordinary circumstances. *See Garland Coal & Mining Co. v. Few*, 267 F.2d 785, 791 & n.7 (10th Cir. 1959) ("While exemplary damages must bear some relation to the injuries

inflicted and the cause thereof, they do not necessarily bear any relation to the amount of damages allowed by way of compensation."). The limitations of the ratio litmus test are well illustrated by the following example that was expounded by the Alabama Supreme Court; that court considered a case after it was remanded by the United States Supreme Court in light of *Pacific Mutual*, which in turn had reviewed the seminal Alabama case—*Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989):

> A constitutionally permissible punitive damages award against a wealthy defendant, who engages in egregious conduct that fortuitously does little real harm but has the potential to do great harm, might involve a greater ratio of punitive damages to compensatory damages than that in this case. In contrast, a constitutionally permissible punitive damages award against a poor defendant, whose reckless conduct causes great actual harm but has little potential to cause other harm, might require a lower ratio of punitive to compensatory damages than that in this case. We find no compelling reason to set an arbitrary mathematical relationship between compensatory and punitive damages. *Imposing such a relationship would inevitably result in injustice, and we decline to impose it.*

Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854, 858 (Ala. 1991) (emphasis added).

There is certainly no assertion here that the amount of the award is excessive in the sense that it represents too large a portion of Oxy's net worth or that Oxy is unable to pay the judgment. In the present suit the actual damages award was $269,000, and the punitive damages award was $30 million, thus the ratio was more than 1:111. Plaintiffs contend that this amount is less than 1% of Oxy's net worth of $6 billion in 1989, and the Court is impressed by plaintiffs' analogy that, placed in proper perspective, the award is akin to a $1,000 award against a company that has a net worth of $100,000. *See Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 & n.3 (7th Cir. 1990). One benchmark of excessiveness is whether the award is a "dangerous financial drain." *Id.*; *Thiry v. Armstrong World*

Indus., 661 P.2d 515, 518 (Okla. 1983). There is no evidence before this Court, nor even the shadow of an inference, that Oxy will be seriously marked by its punishment.

Oxy argues that the ratios have been high in some cases but "relatively small in absolute terms." Oxy's reply brief at 4 (June 14, 1991); *compare e.g.*, *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 909, 919 (Okla. 1982) (1:44 ratio approved—$1.5 million award), *appeal after remand*, 713 P.2d 589 (Okla. 1985); *Spaeth v. Union Oil Co.*, 762 F.2d 865, 866 (10th Cir. 1985) (upholding ratio of 1:114—$2 million award), *cert. denied*, 476 U.S. 1104 (1986); *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1366 (10th Cir. 1987) (ratios of 1:50,000 and 1:50 upheld—$50,000 and $25,000 respective awards); *Jones v. Lennington*, 629 P.2d 805, 807 (Okla. Ct. App. 1981) (noting in dictum that a ratio of 1:1 million might be permissible under particularly intolerable circumstances) *with Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1156, 1177 (10th Cir. 1981) (on rehearing en banc) (ratio of 1:3 found to be excessive—$2 million award approved), *cert. denied*, 464 U.S. 824 (1983). But from the angle of justice, the Court submits that punitive damages in this case should avoid being "relatively small in absolute terms." The ratio of 1:111 in this case hopefully has significant leaning in absolute terms with relation to Oxy's wealth—and well it should.

The Court has scrutinized the proportionality of the actual damages to that of the amount of punitive damages in the instant case and does not find the award to be excessive. In *Eichenseer v. Reserve Life Ins Co.*, 934 F.2d at 1384; there was a 1:500 ratio between the actual damages award and the punitive damages award of $500,000. In affirming the judgment following remand from the Supreme Court in consideration of *Pacific Mutual*, the Fifth Circuit reasoned that the award was one third of one percent of defendant's net worth, and "[o]ne of the *fundamental* purposes of punitive damages is to deter a wrongdoer from future misconduct." 934 F.2d at 1384 (emphasis supplied); *cf. Mason v. Texaco, Inc.*, 948 F.2d at 1561 (The Tenth Circuit ordered a remittitur of $12.5 million of a $25 million award under the peculiar circumstance that a prior

jury had not awarded even one cent in punitive damages.). The Due Process Clause does not require punitive damage awards to be ineffectual and impotent. *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d at 1384; *see also Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d at 858 (affirming trial court's acceptance of award of $499,000 with a ratio of 1:499 following the Supreme Court's remand in light of *Pacific Mutual*).

Under Oklahoma law, punitive damages are awarded to punish the wrongdoer, and therefore "Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages." *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1115 (Okla. 1991) (filed subsequent to, but not discussing, *Pacific Mutual*). Instead, the focus is on the harm that defendant's conduct caused to society; however, the Court may take the amount in actual controversy into account in determining the correctness of the punitive damage award. *Id.*; *accord Silkwood v. Kerr-McGee Corp.*, 769 F.2d at 1460 (under Oklahoma law the factors to be considered for assessing the excessiveness of a punitive damages award are risk of wrongful conduct, and deterrent effect; and although no proportionality is required, the analysis is not open ended as there must be a relationship to the injuries actually suffered by plaintiff and to society as a whole).

Oxy is correct that the damage award is large, but Oxy is incorrect that it is too large *under the circumstances of this case*. Punitive damages should be more than a nuisance; in the proper instance they must leave marks. *See Thiry v. Armstrong World Indus.*, 661 P.2d at 518 (the punishment function of punitive damages should sting); *Oller v. Hicks*, 441 P.2d at 360 (The jury's verdict will not be lightly interfered with in consideration of a claim of excessiveness).

V. CONCLUSION

The elaborate and labor-intensive procedures set forth above adequately satisfy Oxy's right to all the process that is due. Oxy's conduct was certifiably reprehensible. This Court found as much by clear and convincing evidence before the jury even retired to deliberate on the evidence. A substantial award of

punitive damages was necessary in this case in order to have a deterrent effect on a megacorporation of Oxy's stature. While sum is indeed substantial, it does not exceed the amount necessary to accomplish the meritorious goals of punishment and deterrence. Any lesser sum would sacrifice justice and fair play in the cost\benefit analysis of the business community and would jeopardize the democratic ideal of a robust free-enterprise system. For all of the above reasons, the judgment shall stand. Therefore, no basis to alter or amend the judgment is presented.

Accordingly, defendant Oxy USA, Inc.'s motion to alter or amend judgment, for remittitur, for judgment as a matter of law or for a new trial is DENIED.

IT IS SO ORDERED THIS 20th DAY OF OCTOBER 1992.

/s/ Wayne E. Alley
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court
for the Western District of Oklahoma

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, TRUSTEE OF THE HAROLD G. HAMM REVOCABLE INTER VIVOS TRUST; GARY H. WRIGHT; CINDY WRIGHT; JEFFERY B. HUME; and FARRAR OIL COMPANY, Plaintiffs,

v.

OXY USA, INC. and WILLIAMS NATURAL GAS COMPANY, Defendants.

No. CIV-90-1006-A

Filed Apr. 17, 1991

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

At issue are defendant Oxy USA's ("Oxy") motions for summary judgment filed separately on January 24, 1991, on plaintiffs' antitrust, and tortious interference claims. Also on that date, Oxy separately filed a statement of undisputed material facts for both motions, including three volumes of exhibits, and on February 13, 1991, Oxy supplemented its statement of undisputed material facts. Also at issue is the Williams Natural Gas Company's ("WNG") motion for summary judgment filed January 24, 1991, on all of plaintiffs' claims. This motion included an errata sheet and three volumes of exhibits. Plaintiffs Continental Trend Resources, Inc. ("CTR"); Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright; Cindy Wright; Jeffery B. Hume; and Farrar Oil Company (collectively "plaintiffs") responded in opposition

on February 26, 1991, and separately filed a statement of material facts in controversy that included six volumes of exhibits, a joint response to both of defendants' motions on the antitrust claims, and a joint response to both of defendants' motions on the tortious interference claims. Defendant Oxy filed reply briefs on each of its motions; WNG filed one reply brief on its motion with a volume of exhibits, and a separate reply to plaintiffs' statement of undisputed facts.

Plaintiffs further submitted an application on March 21, 1991, with an addendum filed March 29, 1991, to supplement their responses to defendants' motions, and defendants responded in opposition on March 28, 1991. The Court finds the materials already submitted to the Court are voluminous and plaintiffs' application to further supplement the record is **DENIED** for the reasons set forth in defendants' responses.

On March 21, 1991, the Court denied plaintiffs' motion to strike Oxy's separate motion on tortious interference. On March 26, 1991, the Court denied plaintiffs' motion to bifurcate defendant Oxy's counterclaim or abstain from hearing it due to a pending state court action.

The Court previously denied plaintiffs' motion for summary judgment regarding the alleged expiration of certain gas processing agreements between plaintiffs and defendant Oxy, and whether a letter of intent between these parties was a binding contract. *Order Denying Plaintiffs' Motion For Partial Summary Judgment*, No. CIV-90-1006-A (W.D. Okla. Mar. 27, 1991).

The Court heard oral arguments on the pending motions on April 1, 1991. The Court hereby incorporates into this Order its reasoning entered in the record at the hearing.[1] Because of the Court's rulings in this matter, only the Court's findings and conclusions regarding the antitrust claims are binding beyond these motions.

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[1]Consequently, any appeal of this matter shall be accompanied by a transcript of the hearing, at appellant's expense, containing the Court's findings and conclusions set forth on the record.

After hearing oral arguments and carefully considering the briefs on the motions for summary judgment, as well as the evidentiary attachments, the Court is satisfied genuine disputes of material facts are present in this case that preclude summary judgment as to all claims except the antitrust claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); Fed. R. Civ. P. 56. Accordingly, defendants' motions are **DENIED IN PART** as to all claims except the antitrust claims. Further, for the reasons set forth on the record and more fully set forth below, defendants' motions for summary judgment are **GRANTED IN PART** as to the antitrust claims.

II. BACKGROUND FACTS

The balance of this Order concerns plaintiffs' antitrust claims under the Sherman Act, 15 U.S.C. §§ 1 & 2, the Clayton Act, 15 U.S.C. §§ 15 & 26, and title 79, section 1 of the Oklahoma statutes. The parties have submitted voluminous and tortuous evidentiary materials, and for the sake of brevity the undisputed material facts are not specifically set forth in this Order. Suffice it to say, after considering these materials the Court finds there is no genuine dispute as to any material fact regarding the antitrust claims, thus permitting summary judgment to be entered for defendants.

Plaintiffs are independent producers and marketers of natural gas and liquid byproducts. Defendants process, market and transport natural gas. Defendant WNG owns the subject Rodman Gathering System, which is a gas-gathering or collection and transmission pipeline system that distributes gas to the intrastate and interstate markets. WNG has a non-binding letter of intent to sell the system to Oxy. CTR was previously a contender for the system. Defendant Oxy co-owns the Rodman Plant with Oryx, a non-party in the present suit. Oxy operates and maintains the Rodman Plant. The Rodman Plant can perform compression and treatment of gas that may be necessary to meet the gathering system's transmission line quality specifications and pressure standards imposed by the Federal Energy and Regulation Commission ("FERC"). FERC Order No. 436 (50 Fed. Reg. 42,408) (1985); *see* stipulation in Final Pretrial Order at 4, ¶ II,A,6. The transmission system is a regulated, non-

discriminatory, open-access transporter of gas subject to FERC's gas tariffs. WNG owns the Rodman Gathering System, but Oxy operates and maintains it.

In regard to their antitrust claims, plaintiffs assert in pertinent part that they

> allege, and discovery has revealed, that through concerted efforts OXY and Williams have jointly controlled the flow of gas and transportation of gas on the Rodman Gathering System by requiring any person who wants to transport gas on the System to enter into arrangements with OXY for the compression, treating and processing of that gas. OXY provides the only field compression on the System and will not provide compression unless Plaintiffs agree to have their gas processed at the Rodman Plant. When OXY demanded that Plaintiffs continue to have their gas treated and processed at the Rodman Plant as a condition to collecting and transporting over the Rodman Gathering System, Plaintiffs rejected this demand. Thus, Defendants have refused to provide transportation service for Plaintiffs' gas to their customers unless Plaintiffs agree to have their gas processed by Oxy. Plaintiffs allege, in part, illegal tying, conspiracy to restrain trade and conspiracy to monopolize.

Order Denying Defendants' Motions For Protective Orders, No. CIV-90-1006-A, at 3-4 (W.D. Okla. Mar. 21, 1991).

III. STANDARD FOR SUMMARY JUDGMENT

The facts presented to a court on a motion for summary judgment must be construed in the light most favorable to the nonmoving party. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. Only genuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986). Finally, the movant must show entitlement to judgment

as a matter of law. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56(c).

Although a court must view the facts and inferences to be drawn from the record in the light most favorable to the nonmoving party, "even under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chem. Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). The Supreme Court has stated "(s)ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

The Supreme Court has articulated the standard to be used in summary judgment cases, emphasizing that the "requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. at 248 (emphasis in original). A dispute is genuine "if a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court stated the question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." *Id.* at 252.

IV. ANALYSIS OF THE ANTITRUST CLAIMS

A. Monopolization and Abuse of Monopoly Power Claim

In order to prevail under section 2 of the Sherman Act, plaintiffs bear the burden of proving: (1) possession of monopoly power in a relevant product and geographic market, and (2) willful acquisition and maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Bright v. Moss Ambulance Serv.*, 824 F.2d 819, 823 (10th Cir. 1987). Monopoly power is the ability to control prices *and*

exclude competition. *Id.* at 824; *accord Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 966-67 (10th Cir.), *cert. denied*, 110 S. Ct. 3241 (1990). Monopoly power is a substantial market power. *Id.* at 967. Defendants argue that defendant Williams Natural Gas Company ("WNG") cooperated with plaintiff Continental Trend Resources, Inc. ("CTR") to achieve a means for CTR to bypass Oxy's Rodman Plant entirely and thereby avoid any need to deal with Oxy. However, defendants assert CTR voluntarily assumed the contractual obligations it had with Oxy, and thus, in effect, CTR imposed the restraint of trade on itself.

Defendants further argue plaintiffs cannot prove defendants exercised monopoly power over the relevant market. The Court finds the relevant market is, more likely than not, comprised of the four-county area in Oklahoma known as the "Sooner Trend" where plaintiffs' wells are located, and which form the basis of plaintiffs' antitrust damages. Defendants argued the entire United States was the relevant market, but for purposes of this motion conceded the four-county area was a more realistic definition. Even if an ultimate fact-finder determines the market is something less, this Court believes beyond a reasonable doubt it is certainly a larger area than urged by plaintiffs, and is such that summary judgment still would be granted. The burden of proof is on plaintiffs to establish the relevant market based on both product and geographical elements, and they cannot meet that burden with their definition. *See C.E. Servs., Inc. v Control Data Corp.*, 759 F.2d 1241, 1244 (5th Cir.), *cert. denied*, 474 U.S. 1037 (1985). In particular, the Court rejects outright plaintiffs' self-serving assertion that defendants control virtually one hundred percent (100%) of the relevant market, which plaintiffs define as the area consisting of only the low-volume wells requiring long-term contracts, and which is controlled exclusively by the Rodman Gathering System.[2] No reasonable jury would accept that definition, and the Court so finds.

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[2]Oxy decisively refutes plaintiffs' definition of relevant area:

In deciding such a matter at summary judgment the Court determines whether the nonmovant has submitted evidence of the essential elements of the claim by viewing "the evidence presented through the prism of the substantive evidentiary burden" so a reasonable fact-finder could find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254.

According to plaintiffs, those characteristics virtually guarantee a lack of competition for the unproductive wells for which plaintiffs claim antitrust injury and damages.

> [A]fter a well has been connected to a system and produced for any significant period, the chances of being able to connect that well to another system with acceptable incremental economics is practically nil. This has the effect of essentially eliminating competition to be faced by a gatherer from other gatherers who could otherwise compete for new wells.

Thus, plaintiff's position is that even though they enjoyed competition to hook up new wells, they are entitled to bring an antitrust action when, after a well has been produced for a "significant period," it would be more expensive to hook up that same well to some other nearby gathering system than it is to continue flowing the gas through the original line that OXY, at great expense to itself, initially constructed to the well. By this definition, every well would be subjected to monopoly power at some point in its life no matter how vigorous the competition in the marketplace.

> It is an odd world indeed when defendants' antitrust liability depends not upon the defendants' conduct but upon how close plaintiffs choose to locate their wells to defendants' facilities and how unproductive plaintiffs' wells turn out to be . . . .
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> . . . [Plaintiffs have] concluded that OXY and WNG have monopoly power by defining the relevant market as the area encompassed by individual wells of plaintiffs whose production is so low that no one else is willing to invest the funds necessary to extend a line to those wells.

Oxy's Reply brief at 3-4 (Mar. 11, 1991) (citations and footnotes omitted). Also, plaintiffs did not genuinely dispute that at least one other pipeline, processor, or purchaser has facilities located within two miles of every point on the Rodman System and each CTR well connected to it. *Id.* at 11-12.

The Court is required only to draw reasonable inferences from the evidence. *See Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (JNOV standard, which is the same for summary judgment as well as for a directed verdict).

Instead, the Court accepts defendants' more judicious definition that the relevant market is the location of the gas wells in the four-county area in Oklahoma that are the foundation of plaintiffs' antitrust damages. The difference in size of the relevant area advanced by plaintiffs is a one-section radius, compared to a one-mile radius advanced by defendants. However, plaintiffs' definition is patently unreasonable because it encompasses an area in which only the defendants' product is located and every company has a natural form of monopoly in the production and sale of its own product. *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 843 (D. Minn. 1989); *accord Consul. Ltd. v. Transco Energy Co.*, 805 F.2d 490, 496 (4th Cir. 1986) ("sources of natural gas . . . in close proximity to . . . pipeline" is ethereal, hypothetical, and an insufficient market definition as a matter of law), *cert. denied*, 481 U.S. 1050 (1987).

A party resisting a motion for summary judgment must do more than make conclusionary allegations; it "must set forth facts showing that there is a genuine issue for trial." *Dart Indus. v. Plunkett Co.*, 704 F.2d 496, 498 (10th Cir. 1983) (quoting Fed. R. Civ. P. 56(e)). Affidavits must be submitted in good faith. Fed. R. Civ. P. 56(g). Conclusionary affidavits are insufficient to defeat summary judgment. *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1380 & n.7 (10th Cir. 1980). Conclusionary opinions of experts that fail to provide specific facts are insufficient as well. *Evers v. General Motors Corp.*, 770 F.2d 984, 986-87 (11th Cir. 1985). Here, the Court can pierce the avalanche of evidentiary materials submitted by the parties, and find there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56 (a-c). Toward this end defendants argue persuasively a monopoly of the relevant market cannot be proved by plaintiffs because the subject Rodman Gathering System,

currently owned by WNG, and the Rodman Plant, owned by Oxy, control less than ten percent (10%) of the relevant market as decided above.[3]

A number of courts of appeals have found that a small percentage of control of the relevant market is indicative *per se* of insignificant market strength, and thus a lack of monopoly power. Therefore, a small market share defeats a section 2 monopolization claim at summary judgment. *E.g.*, *Barry v. Blue Cross*, 805 F.2d 866, 874 (9th Cir. 1986) (16% of the "market share is far below what we would require for a monopoly"); *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d at 1245 (5th Cir. 1985) (20% and 25% renders section 2 claims unsustainable as a matter of law); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 261 (3d Cir. 1984) (32-35% of the market share is insufficient as a matter of law to establish monopolization), *cert. denied*, 471 U.S. 1016 (1985); *United States v. ALCOA*, 148 F.2d 416, 424 (2d Cir. 1945) (Hand, J.) (Over ninety percent of the market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."). *But cf. Dimmitt Agri Indus. v. CPC Int'l*, 679 F.2d 516, 529 (5th Cir. 1982) ("[M]arket shares in the range of 16 to 25 percent . . . are insufficient—at least absent other compelling structural evidence—as a matter of law to support monopolization."), *cert. denied*, 460 U.S. 1082 (1983).

While the parties drew their battle lines at the perimeters of the respective relevant markets they proffered, the Tenth Circuit seems to require an inquiry beyond market share alone. *Compare Reazin v. Blue Cross & Blue Shield*, 899 F.2d at 968 ("We prefer the view that market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power.") *and Shoppin' Bag v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986) (besides market

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[3]Plaintiffs are also seeking to add another 46 wells to support their antitrust injury, but these additional wells were the subject of a motion in limine filed March 5, 1991, by WNG. That motion is mooted by this Order.

share, other factors to be considered are number and strength of competitors, difficulty of new competitors entering market, consumer sensitivity to price changes, innovations or developments in the market, multimarketing by defendant, and other persuasive evidence of market strength) *with Colorado Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%.") (dictum), *cert. denied*, 111 S. Ct. 441 (1990).

After reconciling the suggested factors as best it can with the evidence presented, the Court agrees with defendants. While market share is not conclusive of market power, there is a direct correlation between a higher market share and a greater likelihood of monopolistic control of the relevant market. *Colorado Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d at 694. Again, monopoly power is a *substantial* market power. *Reazin v. Blue Cross & Blue Shield*, 899 F.2d at 967. The presumption that defendants' relatively insignificant market share cannot constitute monopoly power is not rebutted by plaintiffs who have to prove that defendants had the power to control prices *and* exclude competition in the relevant market as will become evident below. *See id.* at 966-67; *accord Bright v. Moss Ambulance Serv.*, 824 F.2d at 823; *cf. id.* at 824 (even a high market share without more is often insufficient to ascertain market power).

Defendants argue persuasively the relevant area is vigorously competitive with 16 different gas gathering systems and transmission lines as well as 13 processing plants, and therefore it is simply inconducive to a monopoly by defendants. WNG also presented evidence that there were alternative methods available through third parties to treat and compress gas other than through Oxy's Rodman Plant, and that WNG sent CTR a letter in this particular regard. Also, while it is disputed, defendants insist the Rodman Gathering System only controls twenty-six percent (26%) of the one-section-radius area embraced by plaintiffs but rejected by the Court, and further their system is not even the largest in that particular area.

Plaintiffs also fail to meet their burden because defendants argue persuasively plaintiffs' own actions of diverting their gas away from the Rodman System and marketing it through various competing lines in the four-county area further dilutes plaintiffs' antitrust theory. Plaintiffs complain that these actions were expensive, but they evidently were not economically prohibitive. Plaintiffs also argue at some point their wells become so depleted competitors will not bother with them, and thus they must be shut-in if there is no access to the Rodman Gathering System. Defendants rebut this contention by asserting it was plaintiffs' own actions of significantly depleting their gas in the low-volume wells that, as a practical matter, excluded competitors, rather than defendants' actions.

Finally, after careful consideration the Court finds plaintiffs cannot support their causes of action under the essential facilities doctrine because WNG would have to construct additional facilities to accommodate plaintiffs due to their conflict with Oxy, and WNG has not unreasonably denied the use of its facilities to competitors as contemplated by the antitrust laws. *See Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985). There is no evidence here of a scheme to drive competitors out of business, and otherwise a competitor generally is free to choose the parties to whom it will offer its products or services. *McKenzie V. Mercy Hosp.*, 854 F.2d 365, 369-70 (10th Cir. 1988). Of course this rule is tempered with WNG's FERC requirement to offer a non-discriminatory, free-access system. But, WNG argues it never refused to provide transmission services it was physically capable of providing. The availability of alternative transmission systems, including the four constructed by plaintiffs, negates plaintiffs' assertion the Rodman System was essential. *Flip Side Prods., Inc. v. Jam Prods., Ltd.*, 843 F.2d 1024, 1032-33 (7th Cir.), *cert. denied*, 488 U.S. 909 (1988).

The Court views plaintiffs' claims as a whole, and will not look narrowly at plaintiffs' individual wells in a strained effort to support plaintiffs' theory. Only unreasonable restraints of trade are prohibited. *Reazin v. Blue Cross & Blue Shield*, 899 F.2d at 959, 964. As to the particular low-volume wells,

plaintiffs must resort to the services the market will bear. The Court realizes this result is economically frustrating to plaintiffs, but they simply have no attainable remedy under the antitrust laws. Plaintiffs must accommodate to the realities of a marketplace that does not highly value such low-production wells. If not all, then almost all, of the wells are the subject of contractual disputes. If a remedy is available, then plaintiffs must resort to that basis of relief.

B. Monopoly Leveraging Claim

As plaintiffs' monopoly claims fail so does their monopoly leveraging claim because the elements are a mirror reflection, and the Court believes it is necessary under this theory to monopolize one market in order to gain competitive leverage in another. *See Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1346, 1348-49 (9th Cir. 1986).

C. Claim of Tying Transportation of Gas to Processing

Furthermore, the Court rejects plaintiffs' tying claim based upon the allegation that in order to use the Rodman system, CTR's use was tied to the use of Oxy's Rodman Plant. Plaintiffs cannot prove anticompetitive tying. *See Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1294-98 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1119 (1990). The Court also finds the tying claim fails for the same reason of lack of monopoly power, based on insignificant market strength, that immobilized the monopolization and abuse of monopoly power claims above.

Under the rule of reason, tying arrangements are disapproved of only when they have a demonstrable exclusionary impact or abet a harmful exercise of power that the seller possesses in the tying product market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35 (1984) (opinion of four justices concurring in the judgment). Plaintiffs have also failed to carry their burden of proving that substantial volumes of commerce have been foreclosed to competitors. *See id.* at 16; *Fox Motors, Inc. v. Mazda Distrib. (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986).

The Court notes that under a tying theory a high market share can be substituted with "a unique or otherwise desirable

product which competitors cannot economically offer themselves." *Fox* at 957; *accord Jefferson Parish Hosp.*, 466 U.S. at 17. Admittedly, this alternative element is a fly in the Court's ointment if focused solely upon plaintiffs' low-volume wells that require long-term contracts, but the Court has rejected that narrow slice of plaintiffs' claim as a basis for the market share inquiry; plaintiffs are saddled with their Complaint as filed with this Court. Further, under the circumstances of this case, the Court believes this alternative element would not save plaintiffs even if applicable. This is so because each pipeline system in the relevant market area is unique to some theoretical degree, and has an inherent cost advantage due to its sphere of a natural monopoly. *Carlock v. Pillsbury Co.*, 719 F. Supp. at 843; *see Fortner Enter., Inc. v United States Steel Corp.*, 394 U.S. 495, 505 & n.2 (1969).

But even more fatal to plaintiffs' theory is the relevant analysis, which does not focus on the narrow effect upon plaintiffs as they urge, but rather focuses on the effect upon the total volume of sales tied in the relevant market. *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 684 (10th Cir. 1984). Plaintiffs cannot begin to meet this burden, and their claim withers. The Court also finds under the evidence presented, plaintiffs were not forced to purchase any allegedly tied products they could not have purchased in the competitive market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. at 12-14 ("It is clear, however, that not every refusal to sell two products separately can be said to restrain competition . . . [i]f each product may be purchased separately in a competitive market . . . .").

Finally, WNG tenders an argument that gas complying with the FERC requirements is not a product that can be neatly separated into components. *Cf., e.g., Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 253 (4th Cir. 1971) (delivery of electricity is not a separate product from the electricity itself due to a lack of dual markets). This theory relates to plaintiffs' assertion that Oxy refused to compress gas in order to make it flow, unless the gas also was treated at its Rodman Plant. This theory is tenuous at best due to the presence of dual markets in the present case; plaintiffs concede

at least some limited gas has flowed through the system that was not processed by Oxy.

In conclusion, even if defendants commanded a significant monopoly power, which they do not, then that power still could be "used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors" as long as that power is not used to impair competition by harming existing competitors or creating barriers to entry of new competitors in the market for the tied product. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. at 14. Even market power can be exploited for the sole purpose of enhancing the price of the tied product. *Id.* Plaintiffs demonstrated they could compete against defendants, but they cannot be heard to complain defendants had a competitive advantage.

D. Antitrust Conspiracy Claims

Along with a finding of a lack of monopoly power, the Court also finds no reasonable jury would find a motive or intent for conspiracy to monopolize the relevant market and to unreasonably restrain trade. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 596-97 (1986). The Court finds defendants' conduct was not manifestly anticompetitive. There is also no reasonable showing of an adverse effect on competition in the marketplace as a whole. *See Ken Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 639 (10th Cir. 1987) (in order to overcome summary judgment, allegations of restraint of trade must be supported by significant, probative evidence).

WNG also argues the conspiracy claims are economically implausible because if WNG does not transport gas then it loses the profit that would be earned, and Oxy likewise argues it has an economic interest in maintaining as high a level of natural gas flow as possible. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587.

There is no evidence WNG receives a direct profit from the Rodman Plant, which is independently owned and operated by Oxy. However, Oxy does operate and maintain WNG's Rodman

System at Oxy's substantial expense, thus benefiting WNG; WNG also stands to gain a profit in the proposed sale of the Rodman System to Oxy. But for plaintiffs' inability to prove defendants had any significant monopoly power in the relevant market, plaintiffs have at least made a prima facie showing of a rational economic motive for a conspiracy. *See id.* But even that showing does not withstand careful scrutiny.

WNG has a contractual agreement with Oxy that calls for the Rodman Plant to be utilized to process and treat gas entering the system, but WNG successfully offered plaintiffs alternatives to the system, thus leading to the severance of the other antitrust claims. There is nothing sinister about this agreement; it was entered into by defendants' respective predecessors-in-interest, and as argued by Oxy, there is nothing in the arrangement that suggests Oxy's obligation to operate and maintain the system is dependent upon the requirement of gas being processed at the Rodman Plant. The agreement does not necessarily run afoul of permissible business relationships in light of the antitrust laws. In fact, plaintiffs constructed four alternative systems of their own for part of their gas, but assert these alternatives are not commercially feasible for individual, low-volume wells. Plaintiffs' Statement of Material Facts in Controversy App. I, Ex. A-8, pp 35, 62, 90-91.

The relevant market as determined by the Court is thriving with competition. Antitrust violations are serious allegations with substantial criminal sanctions, as well as severe civil penalties. The Court does not take such allegations lightly, and believes that no reasonable fact-finder could find for plaintiffs. Should Oxy purchase the Rodman System from WNG, then it will be Oxy that is required to maintain an open-access system under FERC.

There is evidence also presented by plaintiffs that Oxy was concerned about losing its processing rights (inferentially to competitors) and brought pressure on WNG to reduce its gathering fees. Plaintiffs' brief at 19, ¶ 1. This evidence leads to a blunt conclusion: the free enterprise system was operating with its intricate mechanism of weights and pulleys as intended; perhaps not as favorably as plaintiffs may have wished, but it

was indeed working. Without weighing the evidence, and looking at it in a light most favorable to plaintiffs, as the Court must do at the summary judgment stage, no reasonable jury could find defendants had such a stranglehold on the relevant market as plaintiffs would have the Court believe. While summary judgment in antitrust cases is disfavored, each case must rise or fall on its particular circumstances, and the very purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587 (quoting advisory committee note to Fed. R. Civ. P. 56(e)).

The Court is not persuaded, after the illumination of the above scrutiny, that plaintiffs have presented direct evidence of a conspiracy as they urge, but even if they have, then summary judgment would still be proper for defendants. *See Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 646-47 (10th Cir. 1987) (distinguishing *Matsushita* when direct evidence or a conspiracy is presented). Plaintiffs proffer the inherited contract between WNG and Oxy as direct evidence of a conspiracy. But that allegedly conspiratorial agreement did not prevent plaintiffs from constructing their own system or even at times bypassing the Rodman Plant through the Rodman System at the suggestion of WNG. WNG's gas nomination procedure and discussions with plaintiffs about the necessity of utilizing the Rodman Plant merely reflect the physical, economic, and historically-accidental realities inherent in the pipeline system. *See United States v. Grinnell Corp.*, 384 U.S. at 570-71. Defendants' actions were consistent both with these realities and with business acumen that is totally independent of any alleged anticompetitive conspiracy. As stated, plaintiffs had competitive options, and actually implemented some of those options, on wells where they say it was economically practical to do so.

Even "a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. at 37 n.7 (opinion of four justices concurring in the judgment). Short of being victims of a complex antitrust conspiracy as they envisioned, plaintiffs, more likely than not,

were victims of tough economic times in the oil patch. The hard reality is plaintiffs may have to make do or even cap the low volume wells until they are competitively attractive. Plaintiffs' conspiracy claims simply lack adequate inertia to survive these motions.

E. State Antitrust Claims

Finally, because the Oklahoma antitrust claims are complimentary to, and virtually indistinguishable from, the federal laws, summary judgment is granted on them as well. *See Young v. Seaway Pipeline Inc.*, 576 P.2d 1148, 1150 (Okla. 1977); *Cooper v. Tanaka*, 591 P.2d 1181, 1183 (Okla. Ct. App. 1978) (persuasive authority only [*see* 20 Okla. Stat. § 30.5; *Oklahoma Court Rules & Procedure* (*State*) at R. 1.200(C)(B), p. 715 (West 1990)]); 79 Okla. Stat. §§ 1-36. The statutes are interpreted substantially the same. *Teleco, Inc. v. Ford Indus.*, 587 P.2d 1360, 1362 (Okla. 1978). Plaintiffs' argument that a concerted action is unnecessary in the state claims does not save them in the Court's view.

V. CONCLUSION

Accordingly, defendants' motions are **DENIED IN PART** as to all claims except the antitrust claims as set forth above; defendants' motions for summary judgment are **GRANTED IN PART** as to the antitrust claims as further set forth above. This Order is entered pursuant to Fed. R. Civ. P. 54(b) and is not a final order subject to an entry of judgment. *See* Fed. R. Civ. P. 58; W.D. Okla. R. 23(A).

Finally, defendant Oxy's request for fees and costs under Rule 11 should be addressed through a separate motion. *See* Fed. R. Civ. P. 11. Without implying that any inference should be taken as to the merits of such a motion, counsel should take heed that motions under Rule 11 also are governed by Rule 11. *See Bygott v. Leaseway Transp. Corp.*, 637 F. Supp. 1433, 1447-48 (E.D. Pa. 1986). This case shall proceed forward on the Court's April 1991, jury trial docket on the remaining claims, and according to the procedures outlined in the record at the hearing held on April 1, 1991.

IT IS SO ORDERED THIS 17TH DAY OF APRIL 1991.

/s/ Wayne E. Alley
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

INSTRUCTION NO. 41

PUNITIVE DAMAGES

In addition to actual damages, the law permits you, under certain circumstances, to award what are known an "punitive" or "exemplary" damages. Such damages are awarded in proper and specified instances in order to punish a wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in similar conduct.

If you find in favor of plaintiffs on their tortious interference with an existing contract claim, their tortious interference with expected contractual business relations claim, or both, then you may award plaintiffs punitive damages. Punitive damages are not to be construed as compensation to the prevailing party but, as stated, punishment for misconduct and an as example to others to deter them from like conduct.

For a party to recover punitive damages, it must be shown that the acts complained of were oppressively, wantonly, or maliciously done. An act is maliciously done if prompted or accompanied by hatred, ill will, or spite toward the injured person individually. Note that malice in this instruction is different from the kind of malice defined under plaintiffs' cause of action. An act is wantonly done if done in a reckless or callous disregard of, or indifference to, the rights of the injured person. An act is oppressively done if done in any way or manner which injures, damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, disability or misfortune of another person.

Although an award of punitive damages is a matter exclusively within the province of the jury, you should always bear in mind that the conditions under which punitive damages may be awarded and the purpose for which the law permits an award of punitive damages to be made. In addition, punitive damages must be awarded with sound reason and calm

discretion. You should never award punitive damages because of sympathy, bias or prejudice. You are further instructed that there is no exact rule by which to determine the amount of punitive damages. While punitive damages must bear some relation to the injury caused by the offensive conduct as well as the conduct itself, they do not necessarily bear any relation to the amount you awarded as actual damages.

If you find in favor of the plaintiffs on their tortious interference with existing contract claim and tortious interference with expected contractual business relations claim, and if you should further find that in committing the acts complained of, the act was done oppressively, wantonly, or maliciously, then you may award punitive damages in such an amount as you deem is warranted by the evidence.

In assessing punitive damages, you may consider defendant's net worth as one of many factors.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONTINENTAL TREND RESOURCES, INC., et al.,

Plaintiffs,

-VS- No. CIV-90-1006-A

OXY USA, INC., et al.,

Defendants.

VOLUME XII

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

HAD ON THURSDAY, APRIL 25, 1991

UNITED STATES COURTHOUSE

OKLAHOMA CITY, OKLAHOMA

BEFORE: THE HONORABLE WAYNE E. ALLEY,
Judge Presiding (Sitting with a Jury)

* * * * * *

THE COURT: Okay. Well, to take up the motions here, granted with respect to conversion. I won't bother to recite again the magic formula that I did state into the record at the time of the motions after Plaintiff rested. The remaining portions of the motion are denied. There is evidence, both direct and circumstantial, from which the Jury could find performance by the counterclaimant as to the Henneman well and the coterminous wells sufficient to permit their returning a finding there. And that's both in the evidence of Miss Horne, and in the

Plaintiffs' evidence, the Jury could conclude quite reasonably that the specified complaints about nonpayment on certain wells is circumstantial evidence that there are no assertions with respect to nonpayment on the other wells that weren't mentioned.

With respect to the Mosier Wells, the motion is denied even though there were arguments that the gas is still there in the ground. The realization of investment is something of course that every contracting party is interested in on a timely basis, and the Jury could find that there is a breach, even though the possibility exists that there might be some future performance of gas that's already in the ground, that there is this obligation of good faith and honest dealing in seeking the benefits of a contract one has entered into, and a breach of that alone would support the cause of action there.

Now, with respect to the Farrar contract, it may be Farrar is nominally sending the gas off elsewhere, but then Farrar has never been identified as the party that breached, and that would necessarily have to be the contractor—I mean the operator of the well.

With respect to the States well, there isn't any claim.

With respect to the allegations of fraud here, some statements that came out in the Plaintiffs' case were not specifically rebutted as by my memory, which is probably not that good, but on the other hand, I don't know of any rule to the effect that the Jury has to believe that evidence. And it's a different proposition when you're talking about being the Defendant when the opponent has the burden of proof, but if you have the burden of proof and you're saying there's fraud in the inducement, it seems to me that the Jury can believe you or not believe you. And that is an affirmative defense here, I think. So I think that takes care of all the motions.

* * * * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONTINENTAL TREND RESOURCES, INC., et al.,

Plaintiffs,

-VS- No. CIV-90-1006-A

OXY USA, INC., et al.,

Defendants.

REPORTER'S TRANSCRIPT OF CLOSING ARGUMENTS

HAD ON MONDAY, APRIL 29, 1991

UNITED STATES COURTHOUSE

OKLAHOMA CITY, OKLAHOMA

BEFORE: THE HONORABLE WAYNE E. ALLEY,
Judge Presiding (Sitting with a Jury)

* * * * * *

—MR. DeVORE'S CLOSING ARGUMENT—

* * * * * *

You look at their—and you're going to get to have the opportunity, if you think it's right, to award punitive damages in this case. And look at their financial statements, look at the way they treat money. Until you get into tens of millions of dollars,

or hundreds of millions of dollars, it's just nothing to them. What is it going to take to punish a company like that?

You know, their daily—if you look in here, their daily revenues are over five million dollars. You know, that's 36 million dollars a week. They have excess cash one year that they turn over almost 600 million dollars to the parent corporation. The other year that's in here, '89, they turn over 400, almost 500 million dollars of excess cash, just cash that's sitting around they don't need. What does it take to punish a company like that?

You know, to us that would be like having—you know, 10, 20, 15 million dollars would be like having a hundred dollar traffic ticket to the rest of us. You start dealing with these giant companies and it takes a real wallop to be able to punish 'em. You know, what do you do with a kid when he's misbehaved? Take away his allowance for a week? You take away OXY's allowance for a week, that's 36 million dollars. Just take their excess cash that they give away every year, take ten percent of that, that's almost 60 million dollars. And they've got 540 million dollars more they're giving away, they don't even notice it. It's ridiculous. It's ridiculous what happens to these big companies. And you think that a case like this means anything? You think a $250,000 actual damage claim means anything to them? It doesn't mean anything.

They talk about how Joe Garrett cares about it. Well, Joe Garrett's a local buyer. What about their management? What about these people that are throwing around these billion of dollars every year? Where are any of those people? They don't even care. They didn't even care enough to walk into the Courtroom. What's it going to take to get their attention? It's going to take a lot of money.

* * * * * *

APPENDIX H

OXY USA INC
MID-CONTINENT REGION
GAS PROCESSING
BOX 26100, Oklahoma City, OK 73126-0100
Telephone 405 749-2000

August 20, 1990

VIA FACSIMILE AND HAND DELIVERY

Mr. Gary White
TRANSOK, Inc.
P. O. Box 3008
2 West 6th Street
Tulsa, Ok. 74119

Re: Continental Trend Resources, Inc., v. OXY USA Inc., District Court, Garfield County, Oklahoma, Cases Nos. CJ-89-1022, 1090, 1140 & CJ-90-538

and,

Continental Trend Resources, Inc. v. OXY USA Inc. and Williams Natural Gas Company, U.S.D.C., Western District of Oklahoma, Case No. Civ. 90-1006-A;

Dear Mr. White:

As a follow-up to my letter to Jim Metcalf, Manager of Plant Operations for TRANSOK, I am enclosing for your review, perusal and information copies of 16 contracts between Continental Trend Resources, Inc. and OXY USA Inc. These contracts cover production that TRANSOK presently is proposing to take from Continental Trend Resources, Inc., despite the contracts enclosed, and despite OXY USA's prior advises to TRANSOK that the deliveries being proposed are in derogation of OXY USA's legal rights.

I also am enclosing for your information copies of the petitions that were filed by Continental Trend Resources, Inc. in the first several of the suits referenced above. I trust that you will appreciate that the enclosed contracts, as well as the petitions, assure that TRANSOK is fully advised in respect of the contracts and business relations now existing between OXY USA and Continental Trend Resources.

While Continental Trend has sought rescission of the contracts, among other claims for relief, each of the cases above currently is in discovery, and, of course, OXY USA has maintained and continues to assert, through its answers, counterclaims and otherwise, that each of the contracts at issue remains valid, in effect, and fully enforceable in accordance with its terms.

You must also be made aware that the delivery of production at issue will in some cases utilize facilities that are owned by OXY USA Inc., and that the use of those facilities for deliveries to TRANSOK is wholly without OXY USA's consent, agreement or acquiescence of any kind, but rather, will constitute a clearly wrongful use of those facilities.

With this communication, OXY USA is assured that TRANSOK will proceed with its current plans to take production from the various wells only with complete and documented knowledge of the existence of the prior legal rights of OXY USA, and that TRANSOK's further actions will be taken only with full knowledge of the circumstances, particularly including the loss, injury and damages that will be caused to and incurred by OXY USA.

Please afford your assessment of this matter your immediate attention. OXY USA will take all appropriate action to protect and to secure its legal rights and property from all wrongful invasion.

Sincerely,

/s/ Joe H. Garrett
Joe H. Garrett
Gas Acquisition Coordinator

cc: Mr. Jim Metcalf w/o enclosures
Christan P. Mai, Esq. w/o enclosures
Michael W. Garrison, Esq. w/o enclosures
Robert H. Hill, Esq. w/o enclosures
Robert C. Smith, Jr., Esq. w/o enclosures
Ronald L. Wilcox, Esq. w/o enclosures

OXY USA INC
MID-CONTINENT REGION
GAS PROCESSING
BOX 26100, Oklahoma City, OK 73126-0100
Telephone 405 749-2000

October 25, 1990

VIA FACSIMILE AND HAND DELIVERY

Mr. Tony Aldrich
Union Texas Petroleum
14000 Quail Springs Pkwy.
Suite 215
Oklahoma City, Oklahoma 73134

Re: Continental Trend Resources, Inc., v. OXY USA Inc., District Court, Garfield County, Oklahoma, Cases Nos. CJ-89-1022, 1090, 1140 & CJ-90-538

and,

Continental Trend Resources, Inc. v. OXY USA Inc. and Williams Natural Gas Company, U.S.D.C., Western District of Oklahoma, Case No. Civ. 90-1006-A;

Dear Mr. Aldrich:

As a follow-up to my telephone conversation with you on October 22, 1990, I am enclosing for your review, perusal and information copies of 16 contracts between Continental Trend Resources, Inc. and OXY USA Inc. These contracts cover production that Union Texas Petroleum presently is proposing to take from Continental Trend Resources, Inc. in the Mosier Farms Area, or as indicated by you in our telephone conversation, may be contemplating to take from Continental Gas' Deep Creek System located in Major County and Blaine County, Oklahoma. It is OXY USA's firm position that the

deliveries being proposed are in derogation of OXY USA's legal rights.

I also am enclosing for your information copies of the petitions that were filed by Continental Trend Resources, Inc. in the first several of the suits referenced above. I trust that you will appreciate that the enclosed contracts, as well as the petitions, assure that Union Texas Petroleum is fully advised in respect of the contracts and business relations now existing between OXY USA and Continental Trend Resources.

While Continental Trend has sought rescission of the contracts, among other claims for relief, each of the cases above currently is in discovery, and, of course, OXY USA has maintained and continues to assert, through its answers, counterclaims and otherwise, that each of the contracts at issue remains valid, in effect, and fully enforceable in accordance with its terms.

You must also be made aware that the delivery of production at issue will in some cases utilize facilities that are owned by OXY USA Inc., and that the use of those facilities for deliveries to Union Texas Petroleum is wholly without OXY USA's consent, agreement or acquiescence of any kind, but rather, will constitute a clearly wrongful use of those facilities.

With this communication, OXY USA is assured that Union Texas Petroleum will proceed with its current plans to take production from the various wells only with complete and documented knowledge of the existence of the prior legal rights of OXY USA, and that Union Texas Petroleum's further actions will be taken only with full knowledge of the circumstances, particularly including the loss, injury and damages that will be caused to and incurred by OXY USA.

Please afford your assessment of this matter your immediate attention. OXY USA will take all appropriate action to protect and to secure its legal rights and property from all wrongful invasion.

Sincerely,

/s/ Joe H. Garrett
Joe H. Garrett
Gas Acquisition Coordinator

cc: Christan P. Mai, Esq. w/o enclosures
Michael W. Garrison, Esq. w/o enclosures
Robert H. Hill, Esq. w/o enclosures
Robert C. Smith, Jr., Esq. w/o enclosures
Ronald L. Wilcox, Esq. w/o enclosures

OXY USA INC
MID-CONTINENT REGION
GAS PROCESSING
BOX 26100, Oklahoma City, OK 73126-0100
Telephone 405 749-2000

October 31, 1990

VIA FACSIMILE AND HAND DELIVERY

Mr. Tom Cook
Phillips Petroleum Company
101 North Robinson
Oklahoma City, Ok. 73102

Re: Continental Trend Resources, Inc., v. OXY USA Inc., District Court, Garfield County, Oklahoma, Cases Nos. CJ-89-1022, 1090, 1140 & CJ-90-538

and,

Continental Trend Resources, Inc. v. OXY USA Inc. and Williams Natural Gas Company, U.S.D.C., Western District of Oklahoma, Case No. Civ. 90-1006-A;

Dear Mr. Cook:

As a follow-up to our meeting on October 29, 1990, I am enclosing for your review, perusal and information copies of 16 contracts between Continental Trend Resources, Inc. and OXY USA Inc. These contracts cover production that PHILLIPS presently is proposing to take from Continental Trend Resources, Inc., despite the contracts enclosed, and depsite OXY USA's prior advises to PHILLIPS that the deliveries being proposed are in derogation of OXY USA's legal rights.

I also am enclosing for your information copies of the petitions that were filed by Continental Trend Resources, Inc. in the first several of the suits referenced above. I trust that you

will appreciate that the enclosed contracts, as well as the petitions, assure that PHILLIPS is fully advised in respect of the contracts and business relations now existing between OXY USA and Continental Trend Resources.

While Continental Trend has sought rescission of the contracts, among other claims for relief, each of the cases above currently is in discovery, and, of course, OXY USA has maintained and continues to assert, through its answers, counterclaims and otherwise, that each of the contracts at issue remains valid, in effect, and fully enforceable in accordance with its terms.

You must also be made aware that the delivery of production at issue may utilize facilities that are owned by OXY USA Inc., and that the use of those facilities for deliveries to PHILLIPS is wholly without OXY USA's consent, agreement or acquiescence of any kind, but rather, will constitute a clearly wrongful use of those facilities.

With this communication, OXY USA is assured that PHILLIPS will proceed with its current plans to take production from the various wells only with complete and documented knowledge of the existence of the prior legal rights of OXY USA, and that PHILLIPS's further actions will be taken only with full knowledge of the circumstances, particularly including the loss, injury and damages that will be caused to and incurred by OXY USA.

This letter is being sent to you by facsimile transmission, with the hard copy and enclosures to be hand delivered to you tomorrow. Please afford your assessment of this matter your immediate attention. OXY USA will take all appropriate action to protect and to secure its legal rights and property from all wrongful invasion.

Sincerely,

/s/ Joe H. Garrett
Joe H. Garrett
Gas Acquisition Coordinator

cc: Christan P. Mai, Esq. w/o enclosures
Michael W. Garrison, Esq. w/o enclosures
Robert H. Hill, Esq. w/o enclosures
Robert C. Smith, Jr., Esq. w/o enclosures
Ronald L. Wilcox, Esq. w/o enclosures

APPENDIX I

CONSTITUTIONAL PROVISIONS

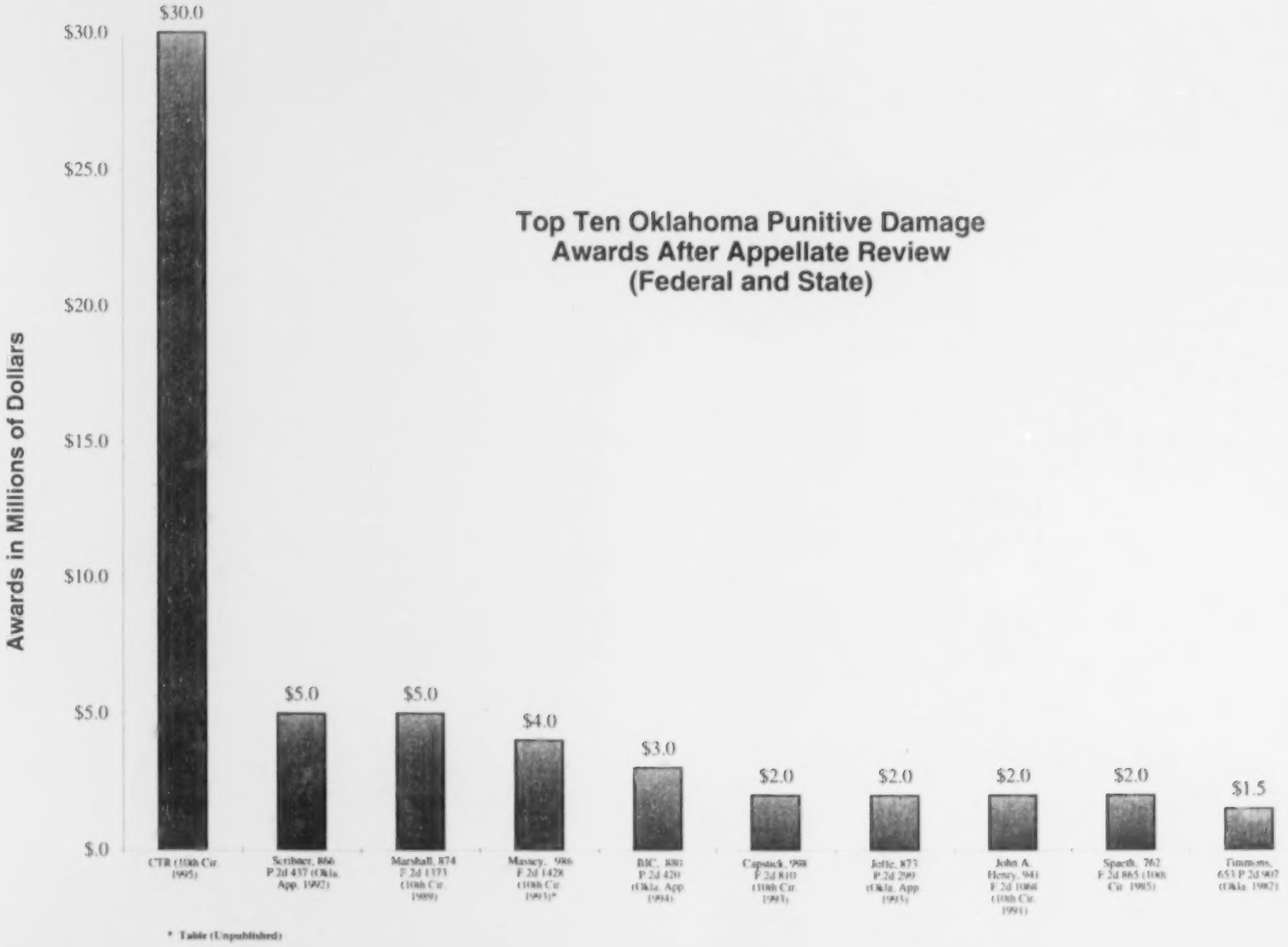
U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J


Top Ten Oklahoma Punitive Damage Awards After Appellate Review (Federal and State)
Awards in Millions of Dollars
$30.0
$25.0
$20.0
$15.0
$10.0
$5.0
$0.0
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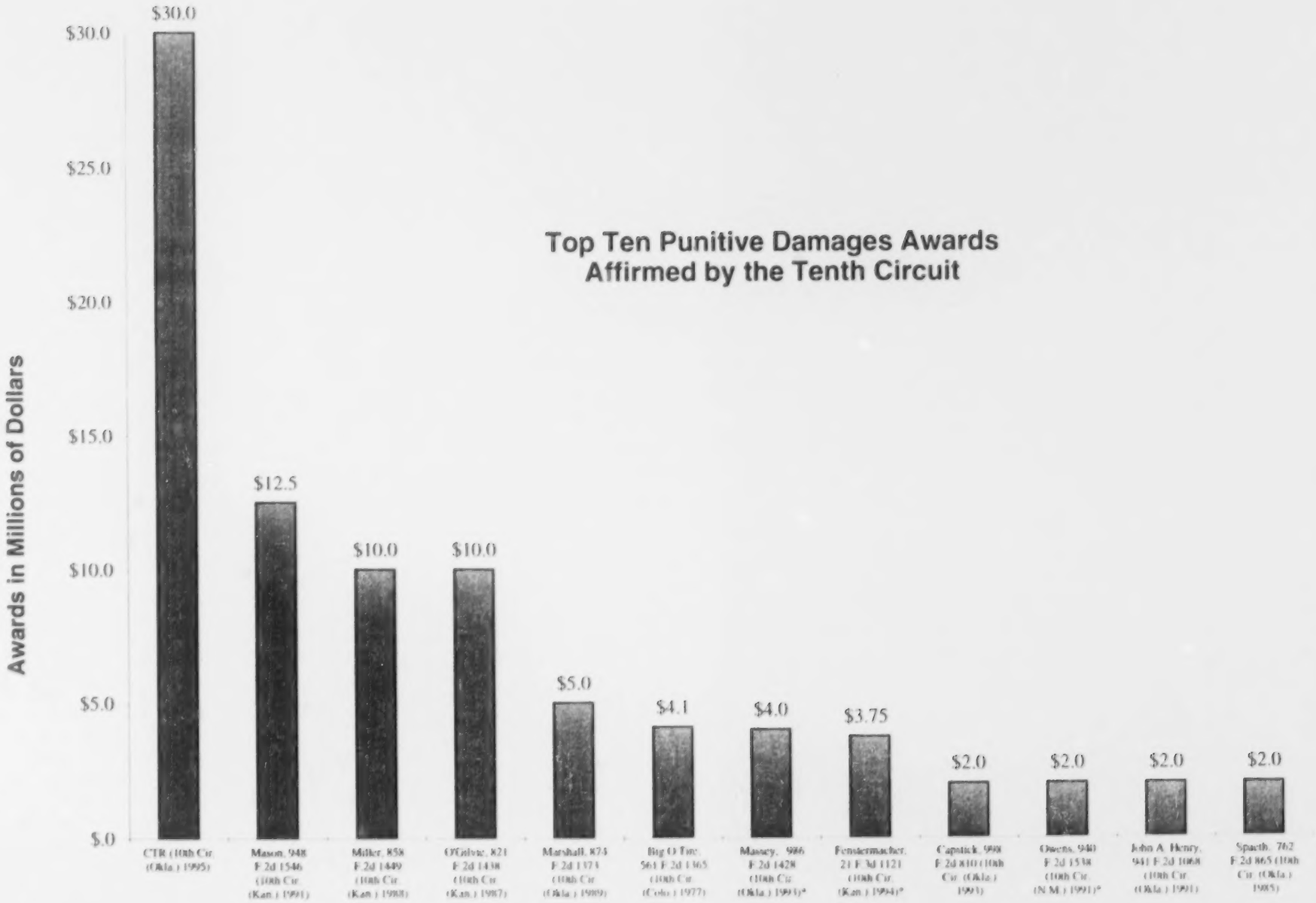
* Table (Unpublished)



* Table (Unpublished)

(2)

Supreme Court, U.S.
FILED
JUN 6 1995
OFFICE OF THE CLERK

No. 94-1838

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

OXY USA INC,

Petitioner,

V.

CONTINENTAL TREND RESOURCES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents disagree that the questions framed by Petitioner are presented by the record before this Court. Respondents have identified the deficiencies in the text of this Brief.

LIST OF PARTIES

There are no parent or subsidiary companies to be listed.

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Petitioner OXY USA Inc. ("OXY") has not properly preserved the errors raised in its Petition for Writ of Certiorari ("Petition"). More fundamentally, OXY's Petition is substantively without merit. It should be denied for many of the reasons this Court typically gives for refusing to exercise its extraordinary and discretionary jurisdiction: (1) the questions presented by the Petition were not raised and/or were waived in the proceedings below; (2) the decision below is plainly correct and the right result was reached; (3) the decision below gave full consideration to this Court's decisions in *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994) ("*Honda*"), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993) ("*TXO*"), and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) ("*Haslip*"), and applied the principles of those cases in the manner requested by OXY. OXY got the due process it wanted, but not the result; (4) this unique fact-bound case was a classic case for jury determination and is of interest only to the parties; (5) the alleged "conflict" among the Circuits is nonexistent; (6) the only question arguably preserved -- whether the verdict is excessive under the unique facts of this case -- is neither of exceptional importance nor does it contain issues likely to recur; and (7) the result urged by OXY is bad policy and would lead to absurd results.

Any of these is sufficient to deny certiorari. All exist. The Petition should be denied.

STATEMENT OF THE CASE

The menu of "errors" contained in OXY's Petition is predicated on a caricature of the record.[1] Of course, this Court

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[1] OXY concedes that its intentional misconduct was sufficiently egregious to warrant a punitive damage award of some amount but not $30 million (Petition, p. 21). OXY's argument is based entirely on its version of the facts and is of no value to the Court. The record, on the other hand, is of immense value to the Court. Because OXY failed to inform the Court of the record, CTR is obligated

(continued...)

generally accepts an appellate court's findings as to "what occurred at the trial" and "the basis of the verdict", *Minneapolis St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931), and here the finding was that OXY's intentional wrongful conduct was "certifiably reprehensible," "insidious" and "oppressive." (Pet App. 62a, 51a, 15a, 21a-22a.) This case has all of the characteristics of misconduct identified by this Court in *TXO* to support a large punitive award -- only more so. *See TXO*, 113 S.Ct. at 2718-22, 2726-27.

A. EVIDENCE AT TRIAL [2]

Beginning in approximately 1987, OXY concocted a "plan"[3] to maliciously interfere with CTR and other producers. (App. 1a, ¶ 1.) The stated purpose of this "plan" was to prevent CTR and other producers from selling natural gas in the free market, in order to force them to enter into non-competitive contracts with OXY so that OXY could reap massive profits. OXY used every tool available to execute its plan for profit, including surveillance (App. 1a, ¶ 2); deliberately shutting-in CTR's and other producers' gas wells (App. 1a, ¶ 3); lying and committing repeated acts of uncontroverted fraud on CTR (App. 1a, ¶ 4);

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[1] (...continued)
to do so pursuant to Sup.Ct.R. 15.1. In the interest of brevity, CTR also incorporates by reference the facts identified in the lower courts' Opinions set forth in OXY's Appendix.

[2] Some of the record references supporting the verdict are identified in the attached Appendix A (1a-2a). The record in this case consists of thousands of pages. CTR is in no way attempting to identify every item of evidence which supports the verdict. Rather, the record references in Appendix A are by way of example. The opinions attached to OXY's Appendix also support the above summary.

[3] In an amazing twist of the record, OXY now asserts that it was CTR's "plan" which was the genesis of this dispute. Of course, there is no record support for this prevarication.

falsifying and altering documents to cover-up its liability (App. 1a, ¶ 5)[4]; testifying falsely under oath (App. 1a, ¶ 6); repeatedly repudiating and breaching contracts (Pet. App. 11a, 21a, 39a-40a, 48a-49a); lying to third parties (App. 1a, ¶ 7); attempting to steal CTR's gas without paying for it to induce CTR to change its position (App. 1a, ¶ 8); filing sham lawsuits against third parties who tried to do business with CTR (App. 1a, ¶ 9); and impermissibly charging millions of dollars of gathering fees to increase its profits knowing it had no right to do so (Pet. App. 49a, 51a).

"Coercing weaker competitors to keep them in their place was Oxy's method of conducting business." (Pet. App. 50a.) OXY admitted its interference before, during and after trial. The only real issue at trial was whether that interference was justified, privileged or excused. OXY tried to justify its tortious interference by asserting contract rights to CTR's gas. CTR proved at trial, however, that OXY's assertion was a sham -- *i.e.*, it was based on contracts which had been terminated, fraudulently induced, had expired, were nonexistent and/or had been materially breached. OXY's actions not only pushed CTR's business to the verge of collapse but also inflicted tortious misconduct on hundreds of other oil and gas producers, affecting potentially 6,000 contracts resulting in OXY receiving millions of dollars in profit. (App. 1a-2a, ¶ 10; Pet. App. 14a-22a, 47a-53a.) The misconduct was so flagrant OXY was forced to admit at trial that it interfered with CTR (1) to make money, and (2) to ensure no other producer would try to escape from OXY's interference. (App. 1a-2a, ¶ 15.)

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[4] The Ohio Supreme Court recently held in a case in which this Court denied certiorari that the act of altering and destroying records to avoid liability cannot be tolerated in a civilized society, and that such conduct is particularly deserving of punishment in the form of punitive damages. *Moskovitzv. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994), *cert. denied*, 115 S.Ct. 668 (1994).

B. JURY VERDICT AND POST-TRIAL PROCEEDINGS

At the close of the evidence, the trial court found there was clear and convincing evidence that showed OXY's conduct evinced oppression and wanton, reckless disregard for CTR's rights. Consequently, the court lifted the "cap" on punitive damages.[5] (Pet. App. 41a-44a.) It was only after the trial court made this finding that it permitted CTR to introduce evidence -- without objection -- of OXY's financial condition. The court then tempered the discretion of the eight-person jury -- two more than legally required[6] -- by "handcrafted deliberation instructions." (Pet App. 44a-46a.) OXY did not object to the court's instruction on punitive damages on the grounds now raised in its Petition, nor did it offer a more detailed instruction.[7] The jury, as trier of fact, independently found OXY's conduct to be heinous, justifying severe punishment.

The trial court conducted an exhaustive 18 month post-trial review of the verdict, including reviewing the entire trial transcript, the exhibits and holding oral argument. (Pet App. 33a-63a.) OXY notably did not challenge on appeal the finding of clear and convincing evidence to lift the cap or the jury's finding of sufficient evidence to support a punitive damages assessment. The Tenth Circuit addressed each of OXY's arguments and, based on its own substantive due process review, found "several factors that support the extremely large punitive damages award." (Pet. App.

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[5] The Oklahoma Legislature instituted this procedural safeguard to ensure that punitive damages awarded under state law are not excessive and that ample due process safeguards are built into the process. *See* Okla. Stat. tit. 23, § 9 (1991).

[6] Studies have shown that there is an increased reliability where juries consist of more than six jurors. *See Ballew v. Georgia*, 435 U.S. 223, 229-44 (1978); *Hanson v. Parkside Surgery Center*, 872 F.2d 745, 750 (6th Cir.), *cert. denied*, 493 U.S. 944 (1989).

[7] In fact, OXY asked the court to give the identical punitive damage instruction on its failed counterclaim.

21a.) The punitive damages entered represents less than 1% of OXY's net worth. The fact that this sum happened to be approximately 111 times the compensatory damages the trial court allowed the jury to consider is an arithmetic curiosity with absolutely no constitutional relevance.

REASONS FOR DENYING THE WRIT

A. REASON ONE - OXY FAILED TO PRESENT AND PRESERVE QUESTIONS 1 AND 2

OXY attempts to raise new arguments never before presented in this case in a transparent effort to make this case appear to be in line with *BMW of North America, Inc. v. Gore*, 115 S.Ct. 932 (1995) ("*BMW*") -- which it is clearly not. Because OXY failed to present or preserve the questions identified in the Petition, they should not now be considered.

1. OXY Failed To Preserve The Issue Presented On The Tenth Circuit's "Shock The Judicial Conscience" Standard Of Review

OXY did not challenge the Tenth Circuit's use of the "shock the judicial conscience" standard. Rather, it told the Tenth Circuit the use of that standard was correct and comported with due process because it required the award be tested by four "critical" objective factors identified in *Haslip* and utilized by the Oklahoma Supreme Court. (App. 2a, ¶ 16.) The Court of Appeals did exactly what OXY asked and reviewed the award by applying the precise factors identified by OXY. (Pet. App. 12a-22a.) Thus, Question No. 1 which asks, *inter alia*, whether the "shocks the judicial conscience" standard comports with the Due Process Clause and standards for review of federal jury verdicts is not properly before this Court. It would be an odd world indeed to allow a party to convince an appellate court to do precisely what it asks and then urge in a certiorari petition that the court erred in so doing.

2. OXY Failed To Raise Any Issue Concerning A Conflict Among The Circuits Or That The Tenth Circuit Applied The Wrong Standards

OXY's related argument that there is a conflict among the federal courts of appeals concerning the appropriate standards for review (including a "comparative" analysis) is also not properly before this Court. OXY did not assert a circuit conflict in the issues raised on appeal, its Appeal Brief or Petition for Rehearing and Suggestion for Rehearing In Banc ("Rehearing Petition") or its Motion to Stay the Mandate. OXY also did not assert that the Court of Appeals applied the wrong standards in its review of the verdict -- rather it asked that the court apply those standards.[8] Finally, contrary to OXY's claim, the Court of Appeals discussed, compared and distinguished the cases cited by OXY. OXY may not now complain that the court below did exactly what OXY asked.

3. OXY Also Failed To Preserve Any Question Concerning Its Financial Condition

OXY asked the district court to instruct the jury concerning the subject of wealth.in the jury instructions and the district court did just that. OXY stipulated without objection to the introduction of its financial condition (which consisted of a single exhibit without testimony at the close of the evidence) and did not object to closing arguments discussing that financial condition. OXY did not request a bifurcated proceeding nor did it take advantage of procedures permitting it to introduce evidence of mitigating factors

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[8] For example, OXY told the district court it was required to apply four "critical" factors identified by *Haslip* -- none of which was the "comparison" analysis it now says the district court should have applied. (App. 2a, ¶ 17.) OXY argued on appeal that the district court's conclusions were erroneous -- not that the district court had applied the wrong factors in reaching those conclusions. (App. 3a, ¶ 18.) In its Rehearing Petition, OXY conceded that the Tenth Circuit applied the appropriate factors. (App. 3a, ¶ 19.)

on financial condition. OXY's only argument on financial condition is that the jury instruction supposedly unfairly singled out wealth and followed a so-called "inflammatory" closing argument. (Petition, pp. 27-30.) The Tenth Circuit held that OXY waived any error on these issues. (Pet. App. 17a.) *Accord Dunn*, 1 F.3d at 1378-79. Further, OXY argued in post-trial motions and on appeal that wealth was a relevant consideration. OXY cannot now complain that the district court and the Court of Appeals cited OXY's financial condition as a relevant factor in affirming the award. (Pet. App. 17a.)

4. Summary

In sum, OXY did not raise the certiorari questions in its post-trial proceedings, on appeal, in its Rehearing Petition,[9] or even in its motion to stay the mandate. This Court will not address claims that were not presented and preserved below. *See United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n.5 (1994); *Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (The Court's "normal practice ... is to refrain from addressing issues not raised in the Court of Appeals."). There are no exceptional circumstances present for this Court to review the questions presented, nor was there a sufficient foundation laid below to allow such a review to occur.

B. REASON TWO - THE DECISION IS PLAINLY CORRECT

Each procedural and substantive due process safeguard required by this Court is present in this case: (1) an eight person jury was determined to be impartial; (2) the district court, pursuant

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[9] For example, the questions identified in the Rehearing Petition as being ones of "exceptional importance" are completely different than the questions OXY now says require the exercise of this Court's extraordinary jurisdiction. (App. 3a, ¶ 20.)

to Oklahoma statute, found by clear and convincing evidence that OXY's conduct was sufficiently malicious to "lift the cap" and allow the jury to consider awarding punitive damages in excess of actual damages; (3) the assessment of the damages was a product of collective deliberation based on the evidence, proper instructions and argument of adversaries; (4) the award was exhaustively reviewed by the trial judge who also heard the testimony; (5) the award was subjected to a rigorous procedural and substantive review by the Court of Appeals and unanimously affirmed; (6) OXY's Petition for Rehearing was unanimously denied and its Suggestion for Rehearing In Banc was reviewed and denied by eight Judges.

These circumstances indicate that the award is entitled to a strong presumption of validity -- indeed, there are persuasive reasons for suggesting the presumption should be irrebuttable. *TXO*, 113 S.Ct. at 2720. In its Rehearing Petition, OXY conceded the Court of Appeals applied the appropriate factors in its review, but nevertheless urged that "viewed in the aggregate, these factors fail to justify an award of this magnitude." (Rehearing Petition, p. 4.) Of course, factual disputes are not a sufficient basis for review by this Court. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175 (1938) (Supreme Court will not grant writ of certiorari merely to review evidence or inferences drawn from it).

C. REASON THREE - THERE IS NO CONFLICT AMONG THE CIRCUITS

The decision below is not in conflict with the decisions of this Court or of any court of appeals, and the court below did not depart from the accepted and usual course of judicial proceedings. Nor does the case present any novel or important question of

federal law.[10] Rather, it merely represents a straightforward application of settled law to a specific set of facts. OXY seeks to transform well-recognized rules of civil and appellate procedure into nonexistent circuit conflicts and asserts questions of due process already resolved by this Court in *Honda, TXO* and *Haslip*. A careful review of the cases cited by OXY and subsequent decisions by the circuit courts show that there is no "real and embarrassing conflict of opinion and authority" between the Court of Appeals' decision in this case and the decisions cited by OXY. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *accord, Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931) ("[T]he asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law.").

D. REASON FOUR - THIS COURT SHOULD DENY THE PETITION NOW – THERE IS NO REASON TO WAIT FOR THE DECISION IN *BMW*

There is no reason to hold this Petition in abeyance pending the Court's decision in *BMW*.[11] The constitutional issues

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[10] Procedural and substantive due process apply equally to federal and state courts alike. *Morgan v. Woessner*, 997 F.2d 1244, 1257-58 (9th Cir. 1993), *cert. dismissed*, 114 S.Ct. 671 (1994). Thus, the imposition of punitive damages in federal court on state claims does not raise "unique" concerns as asserted by OXY. (Petition, pp. 9, 12.) Moreover, OXY failed to move for a judgment as a matter of law at the close of the case and thereby failed to preserve any issue concerning a Fed.R.Civ.P. 50 review, and the review standards on a motion for new trial under Fed.R.Civ.P. 59 are well established. *See* discussion *infra*.

[11] Since the filing of the petition for writ of certiorari by BMW, this Court has denied certiorari in eight punitive damage cases. *See Berj Boyajian v. Olfacto-Labs*, 63 USLW 3756 (U.S. May 30, 1995) (No. 94-1636); *AJ & AJ Servicing, Inc. v. Tudor Assoc., Ltd., II*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1380); *M. Harold Ezzone v. Willis M. Hansen*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1513); *Ferrellgas, Inc. v. Clay*, 115 S.Ct. 1102 (1995) (No. 94-1066); *Dow*

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presented in *BMW* have nothing in common with this case. First, unlike the defendant in *BMW*, OXY has not been punished for arguably lawful transactions that occurred outside the state. OXY's offending conduct against CTR took place entirely in Oklahoma. Thus, the primary issue of extraterritorial punishment raised by *BMW* was not presented to the court below nor is it presented here.

Second, *BMW* does not involve the type of reprehensible, fraudulent, intentionally tortious conduct present here. Punitive damages of $2 million for imperceptibly touching up the paint on a new BMW without revealing that fact to the purchaser might be suspect under *BMW*'s facts; but punitive damages are properly awarded, and in significant amounts, in cases of intentional tort, deceit, conversion and fraudulent trade practices. *See TXO*, 113 S.Ct. at 2726 (Kennedy, J., concurring).

Third, the principles of law urged by *BMW* and its amici are not only different from those urged by OXY, they are inconsistent. *BMW* does not assert that a comparative analysis is an essential or even an appropriate component of an excessiveness review. (*See BMW* Petitioner's Brief, pp. 29-44.) *BMW* and its amici are instead concerned with multiple punishment for the same act or course of conduct -- an issue wholly lacking here. More fundamentally, *BMW* and its amici concede that there should be no mechanistic test applied. Rather, *BMW* and its amici agree that each case should be determined on its own facts and that intentional tortious conduct (such as that employed by OXY in this case) is a sufficient basis to warrant large punitive damages -- particularly where the profit motive is large. (*See, e.g., BMW* Petitioner's Brief, pp. 22, 28, 30-32, 37.)

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11 *(...continued)*

Corning Corp. v. Hopkins, 115 S.Ct. 734 (1995) (No. 94-861); *Figgie v. Moskovitz*, 115 S.Ct. 668 (1994) (No. 94-781); *Louisiana-Pacific Corp. v. Orjias*, 115 S.Ct. 511 (1994) (No. 94-536); and *Jacobs Mfg. Co. v. Sam Brown Co.*, 115 S.Ct. 487 (1995) (No. 94-653) and 115 S.Ct. 1251 (1995) (No. 94-989). Each of those cases raised issues substantially identical to those raised by OXY.

E. REASON FIVE - THIS CASE IS NOT ONE OF EXCEPTIONAL IMPORTANCE NOR DOES IT CONTAIN ISSUES LIKELY TO RECUR

While the outcome may be of vital importance to the parties, the distinctive nature of this case will have no precedential value beyond its facts. Other than the application of *Haslip*, which itself presents nothing novel, OXY has raised only questions concerning the sufficiency of the evidence which are not constitutional and which were correctly decided.

Moreover, our federal structure of government "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). To promote the development of sound public policy, this Court has recognized the need to leave breathing space for state experimentation.

Such breathing space is especially warranted now. The lower courts are only now having the opportunity to apply the principles refined in *TXO* and *Honda*. Moreover, the state legislatures and Congress are in the midst of a dramatic and unprecedented recrafting of the law of punitive damages by enacting a broad array of measures for guiding and limiting the assessment of punitive damages. For example, although Oklahoma is one of only three states to restrict an award of punitive damages to no more than actual damages unless extraordinary circumstances are shown, the Oklahoma Legislature is currently in the process of enacting further limitations to the Oklahoma punitive damages statute.

Oklahoma is not unique.[12] The Justices of this Court

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[12] In fact, only five states have not enacted punitive damage limiting legislation in the past two decades. *See* Thomas Koenig & Michael Rustad, *The Quiet Revo-*

(continued...)

have recognized that a state's interest in punitive damages is largely one of a legislative and public policy concern. *See, e.g.*, *TXO*, 113 S.Ct. at 2724, 2727 (Kennedy, J., concurring) (referring to the possibility of "legislative intervention that might prevent unjust punitive awards."); (Scalia, J., with Thomas, J., concurring) ("[s]tate legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime."). Even if there is a so-called "punitive damage crisis," which Respondents submit the empirical evidence shows there is not -- states and Congress are dealing with it.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE FACTORS OXY ASKED IT TO APPLY AND SUCH APPLICATION PRESENTS NO CONFLICT AMONG THE CIRCUITS

After asking the Court of Appeals to apply its "shocks the judicial conscience" standard of review, OXY now tells this Court that such a standard is inappropriate and that the Circuits are in conflict -- indeed, "disarray" as to how to conduct judicial review of punitive damages. (Petition, p. 11.) This conclusion is based primarily on OXY's unscientific and selective discussion of punitive damage cases in other jurisdictions.[13] However, even OXY admits that the review process that is occurring in Oklahoma and the Tenth Circuit -- a process OXY was willing to accept until

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12 (...continued)
lution Revisited: An Empirical Study Of The Impact Of State Tort Reform On Punitive Damages In Products Liability, 16 Just. Sys. J. 21 (1993).

[13] OXY unabashedly cites its own counsel's amicus brief in *BMW* to support its conclusions. (Petition, p. 7.) Counsel's conclusions concerning punitive damages in Alabama are vastly different from the empirical evidence presented to the Alabama courts in the post-trial review process. *See Duck Head Apparel Co., Inc. v. Hoots*, __ So.2d __, 1995 WL 64270, *28 (Ala. Feb. 17, 1995).

the results were issued -- has worked well and uncontroversially. (Petition, pp. 18-19.) OXY's "standard of review" question is not only procedurally deficient -- *see* pages 5-7, *supra* -- it is also substantively without merit.

A. THE REVIEW PROCESS IS WORKING

OXY argues that there is an "unabated" punitive damages explosion.[14] It also suggests that judicial review of punitive damage awards is becoming "extinct"[15] resulting in awards that are arbitrary, capricious and growing in size and number. Both claims are demonstrably false.[16] A recent review of punitive

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[14] OXY's punitive damage explosion analysis is counter-intuitive. On the one hand, OXY suggests that punitive damages are out of control and are being awarded in huge, arbitrary and capricious amounts. On the other, it suggests that if the Court applied a pure comparative analysis to this case, all other cases involve smaller punitive damage awards and this award should therefore be reduced. This "heads I win, tails you lose" sophistry exposes the transparency of OXY's moving target litigation tactics.

[15] OXY's conclusions concerning judicial review after *TXO* (Petition, p. 10) is erroneous and misleading. First, it is based on an extremely small sample and therefore suspect. *See Honda*, 114 S.Ct. at 2341 n.11. Second, it is simply wrong. For example, the courts in *Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357 (9th Cir. 1994), *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1063 (1994), *Jeffries v. Harleston*, 21 F.3d 1238 (2nd Cir. 1994), among others, reversed or vacated punitive damage awards after *TXO*. Third, the "survey" does not take into account federal district court review. *See Honda*, 114 S.Ct. at 2341 n.11. Finally, because due process applies equally to state and federal courts, OXY's omission of cases involving state court review after *TXO* is telling as many state appellate and district courts have reversed or remitted punitive damage awards.

[16] The suggestion that jurors are arbitrary and capricious conflicts with every available empirical study. *See generally*, Valerie P. Hans & William F. Lofquist, *Jurors' Judgments Of Business Liability In Tort Cases: Implications For The Litigation Explosion Debate*, Law & Society Review, Vol. 26, No. 1 at 11 (1992); (continued...)

damage research conducted by federal government researchers, independent foundations and university scholars concludes that "every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support" the claim that punitive damages have grown dramatically in both frequency and size.[17] The cases referenced in OXY's Petition show that under appropriate facts and circumstances, the Tenth Circuit and the Oklahoma Supreme Court have (and will) reduce or reverse punitive damage awards on excessiveness grounds. (Petition, pp. 18-19.) *See also Honda*, 114 S.Ct. at 2341 n.11 (concluding that empirical evidence shows that review process is working); *Dunn v. HOVIC*, 1 F.3d 1371, 1388 (3rd Cir.), *modified in part*, 13 F.3d 58 (3rd Cir.), *cert. denied*, 114 S.Ct. 650 (1993) (same). The Tenth Circuit applied the identical legal principles in this case that it had previously applied in the cases referenced by OXY. What is different between this case and the cases referenced by OXY is the record, and it is the record which is paramount, not what different juries or judges did based on different facts.

Finally, even if one could conclude that punitive damage verdicts have increased against businesses, that fact is more likely attributable to the explosion of corporate crime and unethical conduct which has befallen this country than arbitrary awards. For

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16 (...continued)
Edith Greene, *et al., Jurors' Attitudes About Civil Litigation And The Size Of Damage Awards*, 40 Am. U. L. Rev. 805 (1991).

17 Michael J. Saks, *Do We Really Know Anything About The Behavior Of The Tort Litigation System -- And Why Not?*, 140 U. Pa. L. Rev. 1147, 1254 (April 1992). *See, e.g.*, Michael Rustad, *Demystifying Punitive Damages In Products Liability Cases: A Survey Of A Quarter Century Of Trial Verdicts* (The Roscoe Pound Foundation ed., 1991); Stephen Daniels & Joanne Martin, *Myth And Reality In Punitive Damages*, 75 Minn. L. Rev. 1 (Oct. 1990); William M. Landes & Richard A. Posner, *The Economic Structure Of Tort Law* (1987); Michael Rustad & Thomas Koenig, *The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers*, 42 Am. U. L. Rev. 1269 (Summer 1993).

example, the average criminal fine per offense imposed on organizations rose almost 20 times (to over $800,000 per offense) from the mid-1980's to 1990 and is steadily increasing.[18] Even so, these same companies are treating the fines merely as a cost of doing business.[19]

B. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL ON THE STANDARD OF REVIEW OR THE FACTORS TO BE APPLIED

1. The Tenth Circuit Applied The Correct Standard

OXY represents the "shock the conscience" standard as a barren phrase which Oklahoma and the Tenth Circuit use to judge punitive damage awards. OXY does not disclose that it asked the court to apply time-tested factors employed by Oklahoma courts and the Tenth Circuit in performing that review. This Court recently emphasized the procedural component of due process and indicated that "traditional practice provides a touchstone for constitutional analysis" and "the common law method of assessing punitive damages d[oes] not violate procedural due process." *Honda*, 114 S.Ct. at 2335, 2339.[20]

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[18] Mark A. Cohen, *Corporate Crime And Punishment: An Update On Sentencing Practice In The Federal Courts, 1988-1990*, 71 B. U. L. Rev. 247 (March 1991).

[19] *See* Amitai Etzioni, *Going Soft On Corporate Crime*, The Wash. Post, April 1, 1990, at C-3, concluding that 62% of Fortune 500 industrial corporations were involved in one or more incidents of corrupt behavior and that the low degree of punishment "allowed many corporations to treat potential fines as a 'cost of doing business.'" *Id.*

[20] Under this approach, judges "generally defer[ ] to the jury's determination of damages" and ask only whether "the damages are 'outrageous,' and 'all mankind

(continued...)

In the proceeding below, at OXY's request, the Tenth Circuit used the three-stage review process identified in *Haslip*. It applied the precise standards requested by OXY and identified by this Court as being relevant to judicial review. These factors are consistent with the federal organizational sentencing guidelines which take into account the seriousness of the offense, the culpability of the organization, the necessity to remedy the harm caused, the pecuniary gain to the organization, the pecuniary loss from the offense, the size of the organization, the level of management involvement, etc. *See* 18 U.S.C. Appx. § 8, *et seq*. Under these factors and taking into account the amount of money involved, the pecuniary gain to OXY, and the other facts identified at pages 2-3, *supra*, and 24-30, *infra*, OXY's multiple offenses could have conservatively generated fines of tens of millions of dollars. *Id*.

2. OXY's Claimed Error Is Illusory

OXY's real argument -- (1) that the Tenth Circuit refused to include as a factor for review "a comparison of the award with awards in similar cases," and (2) that such refusal placed it in

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20 (...continued)
at first blush must think so'" or whether damages are "'so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury.'" *Honda*, 114 S.Ct. at 2336 (citations omitted). The Court explained:

> Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (whether "no rational trier of fact could have" reached the same verdict).

114 S.Ct. at 2341 n.10.

conflict with decisions in other Circuits -- has been waived and in any event, is wrong for four reasons.

a. The Tenth Circuit Compared This Case With The Cases Cited By OXY

OXY argued in the court below that there was a distinction between cases involving only economic injury and those involving personal injury. The cases relied on by OXY were dissimilar in their facts and the applicable law. Thus, the Tenth Circuit addressed, compared and distinguished those cases. (Pet. App. 19a-20a.) The Tenth Circuit went further and compared the award to similar cases and found that under like circumstances, substantial verdicts had been entered. (*Id.*) OXY's representation, therefore, that the Tenth Circuit held that a comparative analysis would "exceed our scope of review" is misleading and taken out of context. What the Tenth Circuit held is that "we would exceed our scope of review if we required symmetry in the manner OXY suggests" (emphasis supplied) (Pet App. 20a), and the symmetry OXY requested was that a comparison analysis (of cases involving companies with larger net worth and smaller punitive damage awards) mandated that this award be reduced. (*Id.*) Of course, OXY's argument conflicts with this Court's holdings in *TXO* and *Haslip* (there can be no "mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case." *Haslip*, 499 U.S. at 18.)

b. There Is No Conflict Among The Circuits

All federal courts of appeal apply the three-tier review process discussed in *Haslip*. Thus, there is no conflict among the Circuits, as OXY pretends. The Ninth Circuit in *Morgan* adopted the same three-stage approach used by the Tenth Circuit, and it used a deferential "grossly excessive" standard in reviewing the punitive damage verdict. It did so, on the state claims, by reference to standards identified by "California law." 997 F.2d at

1259.[21] In applying these standards, the court observed that it was permissible but not required (as the Tenth Circuit found) to "look at awards in similar cases" as one of many factors.

The Third Circuit in *Dunn v. HOVIC*, *supra*, also applied a "shock the conscience" standard. That court *en banc* underscored the fact-intensive nature of the *Haslip* due process analysis. 1 F.3d at 1382. It did not, as OXY asserts, fashion a federal standard of review but rather applied the law of the Virgin Islands which had adopted by statute the *Restatement (Second) of Torts*. 1 F.3d at 1374, 1378-91. Section 908(2) of the *Restatement* happens to include as a factor a consideration of awards of punitive damages in similar cases. OXY also errs in claiming that the court conducted a "*de novo*" review of punitive damage awards in similar cases. Instead, the *en banc* decision embraced a deferential review of the award based on a variety of factors (1 F.3d at 1381), including one factor inapplicable here but paramount in *Dunn, i.e.*, "the effect of successive punitive awards in asbestos litigation." 1 F.3d at 1391.

The Seventh Circuit decision cited by OXY also applied state law to determine that among the review factors to be considered was a comparison of the award to analogous settings. In *DeRance, Inc. v. PaineWebber, Inc.*, 872 F.2d 1312 (7th Cir. 1989), the court did not reduce the $7 million punitive award by contrasting it with awards in analogous settings, but rather based the reduction "entirely upon the conclusion that the award was excessive because it exceeded the amount commensurate with the degree of PaineWebber's wrongdoing." 872 F.2d at 1329 n.10.[22]

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[21] In *Morgan*, there were both federal and state law claims and the court applied federal standards to the federal claims and state law factors to the state law claims.

[22] OXY's citation of *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) is questionable after the Fourth Circuit's *en banc* decision in *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1416 (4th Cir. 1992) and its subsequent decisions in *Tudor Assoc., Ltd., II v. AJ & AJ Servicing, Inc.*, 36 F.3d 1094, 1994 WL

(continued...)

OXY also overlooks that both the review process used and standards applied by other courts of appeal (and subsequent decisions in the above Circuits) both before and after this Court's decision in *TXO*[23] are entirely consistent with the Tenth Circuit's review process.[24] For example, every federal court of appeals after *Haslip* has held that the reviewing court in a diversity case is to determine whether the jury's verdict is within the confines set by state law and substantive due process by reference to deferential federal standards developed under Rule 59. *Id*; *see generally Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The cases cited by OXY show that far from being in conflict, the Circuits are substantially uniform concerning the review process. The fact that OXY failed to preserve many of its arguments at trial and did not get the result

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[22] (...continued)
510456 (4th Cir. 1994), *cert. denied*, 63 USLW 3812, 63 USLW 3817 (May 15, 1995); *Winant v. Bostic*, 5 F.3d 767 (4th Cir. 1993). Moreover, the lack of an entitlement under state law to any award of punitive damages under the facts in *Mattison* renders the opinion in that case pure *dictum*, not affording it precedential authority. *Colgrove v. Battin*, 413 U.S. 149, 152 & n.13 (1973).

[23] The cases cited by OXY were all decided before this Court's decision in *TXO*.

[24] The following cases used a three-stage review process applying state law factors substantially identical to those used in the courts below. *See Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1251 (1995); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 734 (1995); *Chemstar, Inc. v. Liberty Mutual Ins. Co.*, 42 F.3d 1398, 1994 WL 650018 (9th Cir. 1994), *petition for cert. filed*, 63 USLW 3599 (U.S. Feb. 6, 1995); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993) (*en banc*), *cert. denied*, 114 S.Ct. 2120 (1994); *King v. Macri*, 993 F.2d 294, 299 (2nd Cir. 1993); *Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266, 1276 (7th Cir. 1993); *Vasbinder v. Scott*, 976 F.2d 118 (2nd Cir. 1992); *Keenan v. City of Philadelphia*, 983 F.2d 459 (3rd Cir. 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1380-86 (5th Cir. 1991).

it wanted does not mean that an appropriate review was not had. Contrary to OXY's analysis, review is not synonymous with reversal and/or remittitur.

c. The Results OXY Seeks Would Make Bad Policy

In *Haslip* and *TXO*, this Court rejected the utility of a comparative approach as a test for assessing whether a particular punitive damage award is presumptively unconstitutional. After mentioning in a single sentence the existence of Alabama's comparative analysis factor, the Court in *Haslip* did not cite that aspect of Alabama law again, and certainly did not identify it as an important aspect of appellate review.[25] (Nor did OXY insist that it was an important aspect of judicial review in the courts below.) In *TXO*, this Court went further and refused to "enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages," because, *inter alia*, each case is unique. 113 S.Ct. at 2720.

Even if the issue were in doubt, the result OXY seeks to achieve -- setting a judicial cap on punitive damages -- is bad policy. An illustration demonstrates the arbitrariness of such a rule. If the first ten cases of any particular tort under similar circumstances resulted in punitive damage verdicts of no more than X dollars, no other case, according to OXY, no matter how egregious the circumstances, could ever warrant a larger punitive damage award. The factors cited by this Court as essential to the review process would be, according to OXY, irrelevant. Such a robotic formula is not only contrary to this Court's prior holdings but would also lead to absurd results. The Fifth Circuit in *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1156-57 (5th Cir. 1985)

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[25] Interestingly, when the Alabama Supreme Court reviewed the punitive damage award in *Haslip*, it also did not make reference to any comparison to other awards. *Haslip*, 553 So.2d 537, 543 (Ala. 1989).

(cited by OXY in support of its argument)[26] recognized this problem and concluded that the touchstone to any standard allowing prior awards to serve as an aid in performing an excessive analysis must be the facts and the record of the individual case. "Of course, simply because certain awards have been *affirmed* does not indicate that these are the highest, or even near the highest, awards which might be allowed." *Id.*

This Court reached the same conclusion in *TXO* that simply because a verdict may be the "highest on record" for a particular form of injury is no reason to reduce it.[27]

Plainly, it would be bad policy to judicially cap the reasonableness of a punitive damage award by reference to awards imposed under different circumstances against different defendants in different states with different facts, no matter what the misconduct is. OXY does not even attempt to explain how this process could possibly produce individualized justice.

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[26] OXY cites the *In re Air Crash* case, among others (Petition, p. 17), to support its argument that Fed.R.Civ.P. 59 required the district court to apply a comparison analysis in reviewing the punitive damage award. (*Id.*) OXY is wrong. OXY never asked the district court to undertake such an analysis. Moreover, none of the cases cited by OXY makes any such holding. They merely hold that pursuant to a particular state's practice under state law, a comparison of one award to awards in analogous cases is one of the many factors a reviewing court may consider. None of the cases hold, as OXY represents, that it would be an abuse of discretion as a matter of federal law not to make such a comparison.

[27] In *TXO*, this Court upheld a $10 million punitive damage judgment, even though TXO argued and the record showed that the award was 20 times larger than the highest punitive damage award ever upheld in West Virginia history, and was 10 times greater than the largest punitive damage award for the same tort in any jurisdiction.

d. The Result Remains The Same Under Any Approach

As noted, the Tenth Circuit applied a comparison analysis and it did not affect the outcome of this case. This is because the required comparison is of this case and similar and analogous cases. OXY did not ask the courts below to compare similar cases. Rather, it first made an arithmetic ratio comparison and then asserted some distinction between economic and non-economic cases. (Pet. App. 19a-20a.) Thus, OXY did not even request the Tenth Circuit to perform the type of comparison OXY now says was constitutionally required.[28] Moreover, compared with other intentional tort cases, the award was clearly in line.[29]

II. OXY HAS WAIVED ANY REVIEW CONCERNING ITS FINANCIAL CONDITION; IN ANY EVENT, THE PUNITIVE DAMAGES AWARD IS NOT EXCESSIVE AND WILL NOT BE AFFECTED BY THE RESULT IN *BMW*

There is no reason to grant certiorari in this case to "clarify" whether a defendant's financial condition is a relevant factor in assessing and reviewing a punitive damage award. Nor

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[28] The cases OXY now says should have been compared are not intentional tort cases, are distinguishable on the facts and, for the most part, were decided prior to the revision of Okla. Stat. tit. 23, § 9 (1991).

[29] *See Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987, *writ ref'd n.r.e.*), *cert. dismissed*, 485 U.S. 994 (1988) ($1 billion for interference); *Swanson v. Schlumberger Tech. Corp.*, 895 S.W.2d 719 (Tex. Civ. App. 1994, *writ requested*) ($35 million for business tort); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 732 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) ($25 million for tortious interference); *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F.Supp. 87, 100 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) ($25 million for business tort); *TXO* ($10 million).

is there reason for this Court to consider whether the punitive damages award was excessive in this case. OXY's attack on the punitive damages award is nothing more than a request for a trial *de novo* on facts which the jury, trial judge and court of appeals found supported the award.

The procedural and substantive due process requirements identified by this Court were faithfully employed by the courts below and the judgment is thereby entitled to a strong presumption of validity. *TXO*, 113 S.Ct. at 2720. OXY had the benefit of the "full panoply" of Oklahoma and federal constitutional protections. *Haslip*, 499 U.S. at 3. Review should be denied.

A. OXY FAILED TO PRESERVE ANY ISSUE CONCERNING FINANCIAL CONDITION

OXY's vague question of "the extent to which a punitive damages award may be predicated on the financial status of the defendant" (Petition, p. 30) has been waived and does not warrant review. *See* discussion at pages 11-12, *supra*. It has also been answered. Financial condition is a relevant factor -- no more and no less. *See TXO*, 113 S.Ct. at 2722-23; *Haslip*, 499 U.S. at 21-22.

In any event, the factual foundation of OXY's argument that the award was based exclusively on OXY's financial condition is groundless and vanishes if one looks at the record. The record reveals an outrageous, calculated plan by a company headquartered in Oklahoma to steal, cheat and lie to prevent CTR from utilizing the free enterprise system.

B. OBJECTIVE FACTORS DEMONSTRATE THAT THE PUNITIVE DAMAGES WERE REASONABLE

OXY raises no issue not settled by this Court's prior decisions, yet it continues to argue that the facts proved at trial were

insufficient to support a large punitive damages award. The record belies the assertion.

1. Cause and Extent of CTR's Injury [30]

OXY's misconduct meets all of the indicia of reprehensibility. It was lengthy in duration. OXY management and attorneys orchestrated the conduct and were aware of the harm the conduct had caused and was likely to cause. After this case was filed, OXY tried to conceal its misconduct by altering and falsifying documents and lying at depositions. The misconduct was widespread. Contrary to OXY's assertion, this case was not simply a commercial dispute between sophisticated corporate parties concerning the interpretation and validity of contracts. (Petition, p. 21.)[31] Instead, as the Tenth Circuit noted, the cause of CTR's injury was the "voluminous evidence that OXY engaged in oppressive and coercive behavior that interfered with Plaintiffs' present and prospective contracts; the consequences of such unchecked behavior could be disastrous." (Pet. App. 21a-22a.)[32] This is the type of conduct that is particularly appropriate for large

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[30] OXY rephrases the factors it urged before the Tenth Circuit. CTR will use the factors OXY asked the Tenth Circuit to apply.

[31] OXY is even attempting to mislead this Court concerning the evidence. Attached to its Appendix are parts of letters provided to third parties. OXY fails to provide the Court with the remainder of the exhibits which included the terminated and expired contracts upon which OXY was relying to assert contract rights. As the district court concluded, OXY's communications with respect to these exhibits consisted of deception, lies and half-truths. (Pet. App. 39a-40a.) OXY's pattern of half-truths apparently is continuing in this Court as well.

[32] OXY's argument is also a curious one. Even OXY conceded in the lower courts that huge punitive damage verdicts are justified if compensatory damages do not reflect the full extent of the harm caused because third parties may have been substantially harmed and if the conduct is outrageous. (App. 3a, ¶ 21.) Such a concession did not help OXY then or now because OXY's conduct did indeed cause substantial harm to third parties and was truly outrageous.

punitive damages. It is precisely the type of wrongdoing that implicates fundamental state interests by interfering with the sanctity of private property and contract rights that lie at the heart of our economic system. Defendants who deliberately engage in an intentional and tortious scheme systematically conducted for profit are more likely to pause if they have to pay more than their expected gain.[33]

OXY's argument that CTR's injury was merely economic (Petition, pp. 23-24), therefore misses the mark.[34] For example, the federal organizational sentencing guidelines exact similar penalties for conduct causing only economic harm. *See* page 16, *supra*. The analysis of what is reasonable in a particular case does not focus on the type of a plaintiff's losses, but rather more appropriately focuses on the defendant's conduct, the potential harm to others and extraction of a defendant's expected profits. *See TXO*, 113 S.Ct. at 2722; *Haslip*, 499 U.S. at 20-22. Defendants who engage in intentional torts must expect the award to be necessarily large. *See, e.g., TXO*, 113 S.Ct. at 2724-26 (Kennedy, J., concurring). This is not a case of negligence or strict liability nor is it one of an innocent party stumbling into a trap for the unwary; instead it is a case of a fully-informed, economically powerful company aware of its options, evaluating those options,

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[33] *See, e.g.*, John C. Coffee, Jr., *"No Soul To Damn; No Body To Kick": An Unscandalized Inquiry Into The Problem Of Corporate Punishment*, 79 Mich. L. Rev. 386 (Jan. 1981) (concluding that economists agree that deterrence only works if punishment greatly exceeds expected gain).

[34] As the Tenth Circuit correctly noted, "there are no cases that hold punitive damages in economic cases must be less than those in personal injury cases..." (Pet. App. 19a) and OXY cites no such case to this Court. The record shows that the harm was great in that OXY almost decimated CTR's business requiring CTR to spend millions of dollars to avoid only a small portion of OXY's interference. OXY also failed to pay for gas and forced unwilling and noneconomic consumption of its services resulting in the plugging and abandoning of gas wells. (App. 2a, ¶ 11.)

and selecting the ones it perceived as being most profitable to it. One who deliberately and knowingly engages in intentional tortious misconduct should not be surprised that its liability will include punitive damages.[35]

The fact that OXY's defense in this case was a ruse, *i.e.*, the assertion of patently frivolous and nonexistent contract rights, *see* pages 2-3, *supra*, is also of no moment. The law of punitive damages would be made to stand on its head if a party could merely assert baseless and frivolous contract rights as a defense to otherwise oppressive conduct.[36]

Finally, OXY's claim that it had no notice that its interference with CTR's prospective business relations was wrongful is without merit. Prior to this case, Oklahoma had recognized the tort of tortious interference with prospective business relations and identified the elements of the tort. *See Overbeck v. Quaker Life Ins. Co.*, 757 P.2d 846 (Okl. Ct. App. 1984). Okla. Stat. tit. 76, § 1 (1991) also clearly defined OXY's conduct as tortious.[37] Moreover, OXY has waived this issue. It did not argue to the trial court that CTR's claims failed to state a claim upon which relief can be

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[35] *See, e.g.*, Amelia J. Toy, Note, *Statutory Punitive Damage Caps And The Profit Motive: An Economic Perspective*, 40 Emory L.J. 303 (Winter 1991); David D. Haddock, *et al.*, *An Ordinary Economic Rationale For Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1 (Jan. 1990); Werner Z. Hirsch, *Law And Economics: An Introductory Analysis*, p. 200 (1988).

[36] The fact that the court found factual questions on OXY's assertion of contract rights on certain of the contracts also does not help OXY. The jury and trial court, based on a developed record, found to the contrary.

[37] *See also John A. Henry & Co., Ltd. v. T.G.& Y. Stores Co.*, 941 F.2d 1068 (10th Cir. 1991), where the Tenth Circuit affirmed a federal district court's recognition of an analogous cause of action (resulting in punitive damages) prior to the interference in this case. The same counsel involved in the trial of the *John A. Henry* case was counsel in this case.

granted, nor did it object to the trial court's submission of punitive damages on CTR's prospective interference claim to the jury. Finally, it did not raise in the court below any issue concerning the constitutionality of retroactive punishment.

2. Harm To Society

OXY's plan for intentional wrongdoing was far-reaching. The record shows overt instances of misconduct against other producers such as shutting in other producers' wells, falsifying and altering documents, devising an overall "plan" to prevent other producers from selling their gas to other purchasers, and impermissibly charging other producers for gathering fees not allowed under its contracts. OXY itself tendered evidence that there were literally hundreds of producers and up to 6,000 contracts involved. (App. 2a, ¶ 12; Pet. App. 15a.)[38] No producer could sell their gas in the free market without OXY's interference -- they had to have a contract with OXY. (App. 2a, ¶ 14.) When CTR finally challenged OXY's anticompetitive conduct, OXY immediately began interfering with CTR's business relations because, as OXY's corporate representative, Joe Garrett, told the jury, "if we let this happen with one producer, we could expect for everybody to want to jump right in the middle of us and do the same thing. So we were trying to protect our plant." (App. 2a, ¶ 15.)

OXY blames the Tenth Circuit for its predicament by claiming the court relied on "gross and untethered speculation" in its conclusions of harm to others, but the record here (like that in *TXO*) showed specific evidence of OXY's wrongdoing to others,

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[38] Indeed, OXY's counsel acknowledged the 6,000 contracts in his Closing Argument. (App. 2a, ¶ 13.) OXY's new argument that these 6,000 contracts were with producers at its 18 gas processing plants located in many states and therefore any consideration of those contracts would be extraterritorial punishment is completely without record support. OXY never asserted any issue of extraterritorial punishment in the court below nor was there any evidence that these contracts and producers were at any plant other than the Rodman Plant.

and the Tenth Circuit found (as in *TXO*) that OXY's tortious conduct directed towards CTR was but part of pattern, practice and plan of deception and intentional wrongdoing.[39]

3. Profit Incentive

OXY concedes that profit incentive is an important component in determining the appropriate amount necessary to punish and deter. It nevertheless mischaracterizes both the record and the Tenth Circuit's holding concerning its profit incentive.

Prior to trial, OXY argued that it had been damaged by over $7 million just by the small amount of gas that CTR had been able to take off the Rodman System. At trial and on its motion for new trial, OXY continued to seek $4.25 million.[40] This "profit incentive" included only the gas CTR managed to take off the Rodman System. (Pet. App. 19a n.15.) Most of OXY's interfer-

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[39] OXY's reliance on the dismissal of CTR's antitrust claims as conflicting with a finding of societal harm is without merit. The antitrust claims were based on different facts, involved different wells, different conduct, different legal theories and different evidence. They were presented without a full development of the record and are irrelevant to a determination of whether OXY's tortious and malicious interference directed at thousands of producers involved widespread societal harm.

[40] The court noted that because OXY owned 50% of the Rodman Plant, it could have recovered only $2.125 million on its counterclaim. (Pet. App. 51a.) The incentive for the Plant and the amount of money sought nevertheless was the $4.25 million in addition to the profit incentive generated by the success of the scheme to interfere. OXY admitted that CTR had at least 140 wells at issue. (Rehearing Petition, p. 5). OXY's expert witness testified that the gas which eventually avoided the interference was only a "handful" of these wells and comprised its $4.25 million counterclaim. The Tenth Circuit found that this "handful" of wells alone created a $2.125 million profit incentive. When you include all of the gas at the Rodman Plant subject to OXY's interference, the profit incentive increased exponentially. Further, as the district court observed, it is impossible to quantify the benefits OXY realized by unjustly enriching its co-owner.

ence was successful and the remaining gas continued to flow through the Plant and OXY continued to profit by virtue of its interference. Thus, by preventing the remainder of the gas from going to the free market, the profit incentive was large indeed. The 6,000 contracts involved also support the conclusion that there was potential widespread injury and profit involved. (Pet. App. 19a-20a.) As a part of its profit incentive, OXY also impermissibly charged "gathering fees" on some of these contracts ranging anywhere from $.07 to $.29 per Mcf for over five years.

OXY itself introduced evidence that its interference was due to its enormous profit incentive. (Pet. App. 52a-53a.) OXY wanted to play the "enforcement lottery" by continuing its tortious practice and hoping that any lawsuits filed would result in judgments less than its profit motive. Perhaps now OXY will be tempted to turn its eyes away from its balance sheet and toward the law.

4. OXY's Financial Condition

CTR has shown above that the punitive damage award is justified based on factors other than OXY's financial position. Nevertheless, OXY did not object to such evidence at trial and conceded that financial condition was a relevant component of the review process. If it is a relevant component, it is not necessary that it be an impotent component.[41]

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[41] The uncontroverted evidence showed that OXY's net worth was $6 billion and that the punitive damages award was less than 1% of OXY's net worth. "[I]t is difficult to imagine that ... the judicial conscience can be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant." *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988). Applying the comparative analysis that OXY urges, this is the typical ratio of punitive damages to net worth. *Cash v. Beltmann North American Co., Inc.*, 900 F.2d 109, 111 (7th Cir. 1990). Indeed, many courts have held that a much higher ratio of punitive damages to net worth is appropriate. *See Moskovitz, supra* (33-50%); *Professional Seminar Consultants,*

(continued...)

Simply put, OXY waived any error on financial condition and its tactical decisions cannot now be reversed. As the district court observed:

> Oxy's stratagem backfired, and any resultant damage was aggravated by Oxy's decision not to introduce any other evidence at trial with regard to its net worth, nor even address the issue during the closing arguments. Oxy must now live with the consequences of its choices.... The trial, which spanned three weeks, was not merely a dress rehearsal for Oxy to correct defects in its trial strategy that went awry. (Pet. App. 58a.)

III. WHATEVER THIS COURT MAY HOLD IN *BMW*, IT WOULD NOT AFFECT THIS DECISION

The constitutional issues presented in *BMW* are not at issue here nor is there any question of extraterritorial punishment. Further, in this case neither the amount of punitive damages nor the findings below raise any issue as to excessiveness. Thus, there is no reason to hold this Petition pending the decision in *BMW*. *See* discussion at pages 9-10, *supra*.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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41 *(...continued)*

Inc. v. Sino Am. Tech. Exch. Council, Inc., 727 F.2d 1470 (9th Cir. 1984) (upholding punitive damages award representing approximately 40% of one defendant's net worth). *See generally*, Annot., *Punitive Damages: Relationship To Defendant's Wealth As Factor In Determining Propriety Of Award*, 87 A.L.R.4th 141 (1991).

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APPENDIX

APPENDIX A

Examples of record references which support the verdict and Statement of the Case:

1. "Plan" to maliciously interfere with CTR and other producers -- Aple. App. 1514, 1532-33.

2. Surveillance -- Aple. App. 618-32, 1885-90.

3. Deliberate shutting-in of CTR's and other producers' gas wells -- *see, e.g.*, Aple. App. 618-32, 791-93, 1515, 1522-26, 1532, 1832, 1834, 1871, 2187, 2216-17, 2247, 2258, 2309, 2314, 2429-33, 2457-58, 2460-63, 2490; Aplt. App. 2554.

4. Lying and acts of fraud -- Aple. App. 1435, 1573-75, 2105E-2124, 2339, 2344-54, 2388-94, 2450-52, 618-32.

5. Falsifying and altering documents -- *see, e.g.*, Aple. App. 1862, 1880, 2450-52.

6. False testimony -- Aple. App. 2461-63, 2468, 2633, 2460-63.

7. Repeated repudiation and breach of contracts, and lying to third parties -- Aple. App. 618-32, 1864-77, 2452-56, 2465-68.

8. Attempts to take CTR's gas without paying for it -- Aple. App. 1590-91, 1614-15, 1883-84, 1892-94, 618-32.

9. Filing sham lawsuits against third parties trying to deal with CTR -- Aple. App. 2448-49.

10. OXY's actions which pushed CTR's business to verge of collapse and infliction of its tortious misconduct on other

producers -- Aple. App. 1532, 1832, 1842, 2156-57, 2169-70, 2296-97, 2302-03, 2309, 2330, 2337-39, 2409, 2430, 2434, 2494-2500, 2533-34, 2566-70, 2611, 2623-24, 2628, 2631, 2634-43, 2650.

11. Evidence that OXY almost decimated CTR's business, put it on the verge of collapse, and shut-in its livelihood -- *see, e.g.*, Aple. App. 1614, 2156-57, 2169-75, 2215A, 2216-17.

12. OXY's admission that there were literally hundreds of producers and anywhere from 500 to 6,000 contracts which were potentially affected -- Aple. App. 2624, 2631, 2698.

13. OXY's counsel's acknowledgment of the 6,000 contracts in his Closing Argument -- Aple. App. 2698.

14. No producer could sell their gas in the free market without OXY's interference; they had to have a contract with OXY -- *see* Aple. App. 618-31, 1493A, 1830-43, 1866, 2152-53, 2408-10, 2428-35, 2499-2500, 2635; Aplt. App. 1769.

15. Statement made by OXY's corporate representative -- Aple. App. 2631.

16. Section IV - Issues To Be Raised On Appeal (Insert #2) of OXY's Docketing Statement filed on 11-2-92 in *OXY USA, Inc., Appellant v. Continental Trend Resources, Inc., Appellees*, No. 92-6350 (10 Cir.); OXY Appeal Brief, pp. 2, 12-13, 29-30; Rehearing Petition, p. 4, 15.

17. OXY's argument to District Court on what factors to apply -- OXY Brief in Support of Motion for New Trial, pp. 4-7; OXY Reply Brief, p. 5; Transcript of Hearing on New Trial, p. 6.

18. OXY argument that District Court's conclusions were wrong -- OXY Appeal Brief, p. 2; Section IV - Issues To Be Raised On Appeal (Insert #2) of OXY's Docketing Statement filed on 11-2-92 in *OXY USA, Inc., Appellant v. Continental Trend Resources, Inc., Appellees*, No. 92-6350 (10 Cir.).

19. OXY's concession of appropriate factors on rehearing -- Rehearing Petition, p. 4.

20. Issues identified by OXY as ones of exceptional importance -- Rehearing Petition, p. 15.

21. OXY concession that egregious conduct warrants huge punitive damage awards -- OXY Motion for New Trial, pp. 8-9.

Supreme Court, U.S.
FILED
JUN 9 1995
OFFICE OF THE CLERK

(3)

No. 94-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OXY USA INC.,

Petitioner,

v.

CONTINENTAL TREND RESOURCES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondents' Brief in Opposition to Certiorari does not refute the compelling reasons that support granting of certiorari in this case. Indeed, the Court has granted certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, which presents one question that is virtually identical to Question 3 in this case,[1] and another question concerning the permissible bases for punitive damages, an issue that is also a factor here. The questions presented by this case were pressed and explicitly passed upon by the court below, and recur constantly in punitive damage litigation in the federal courts.

1. Respondents contend that the questions presented are neither important nor likely to recur, *see, e.g.*, Opp. at 11-12, but that assertion cannot be squared with this Court's jurisprudence. The Court has accepted seven cases raising constitutional objections to punitive damages in civil litigation during the past ten years.[2] In countless other recent cases, the Court, or individual Justices, have

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[1] *Compare* Pet. at i ("Whether a $30,000,000 punitive damage award, which is more than 100 times greater than respondent's compensatory damages, is so excessive as to violate the Due Process Clauses . . . .") *with* Pet. in *BMW* at I ("Whether the $2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is grossly excessive in violation of the Due Process Clause . . . .").

[2] *BMW of N. Am., Inc.* v. *Gore*, No. 94-896; *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331 (1994); *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986).

expressed reservations concerning the capricious, excessive, unpredictable and potentially unjust manner in which punitive damages are awarded. *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 9-12 (1991) (citing cases).

In its six previous punitive damage decisions, the Court has made clear that punitive damages raise "important" constitutional questions that "must" be resolved, *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986), and has held that Due Process places both substantive and procedural limitations on the magnitude of punitive damages and the manner in which they are awarded. *E.g.*, *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994). Unfortunately, apart from these general conclusions, the Court's constitutional guidance has been unclear at best: the six prior cases resulted in twenty-two separate opinions and very little concrete guidance. In its most recent decision involving the question of excessiveness, the Court produced a three-Justice plurality opinion on some issues, a four-Justice plurality on others, and three additional concurring and dissenting opinions.[3]

Despite the Court's concern regarding the magnitude of punitive damages and the processes that produce these awards, the magnitude and frequency of punitive damage awards in state and federal courts have continued to grow explosively. *See Haslip*, 499 U.S. at 61 (O'Connor, J.,

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[3] *TXO*, 113 S. Ct. at 2711-24 (plurality opinion of Stevens, J., joined in its entirety by Rehnquist, C.J. and Blackmun, J. and joined as to Parts I and IV by Kennedy, J.); *id.* at 2724-26 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2726-28 (Scalia, J., joined by Thomas, J., concurring in the judgment); *id.* at 2728-42 (dissenting opinion of O'Connor, J., joined in its entirety by White, J. and joined as to Parts II-B-2, II-C, III, and IV, by Souter, J.).

dissenting); Brief *Amici Curiae* of Life Ins. Co. of Ga., *et al.*, in *BMW of N. Am., Inc.* v. *Gore*, No. 94-896, at 14-21, App. A-C. Indeed it has become relatively common for jurors to award tens or hundreds of millions of dollars in punitive damages.[4]

Uncertainty regarding what is an excessive punitive damage award, what factors may be considered in dispensing this form of state-sanctioned punishment, and the standards by which jury verdicts are to be reviewed has led to confusion and inconsistency throughout the United States. Except in the most subjective of terms, juries simply do not know how much punitive damages to award, and trial and appellate courts do not know how much punishment to approve. Indeed, the features common to most cases are that (1) juries are advised to award as much as they deem necessary to punish and deter according to whatever factors they choose to consider, (2) the wealth of the defendant is the overriding, dominant factor in many cases, and (3) post-trial and appellate review is indefinably subjective except that it is usually based on some variation of a "shock-the-judicial-conscience" test.[5]

This case is a particularly egregious manifestation of the state of punitive damage jurisprudence in the United States:

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[4] For example, California juries are now awarding punitive damage awards in excess of $10,000,000 on an average of once every 2.3 months. *See id.*, App. C.

[5] Respondents were unable to unearth a single additional decision of a federal appellate court since *TXO* reducing a punitive damage award on grounds of excessiveness. None of the three post-*TXO* cases cited by respondents as proof that excessiveness review is effective did, in fact, reduce a punitive damage award on excessiveness grounds. *See* Opp. at 13 n.15.

A $30,000,000 punitive damage award, six times higher than the highest previously confirmed award under applicable state law and the largest disputed award ever affirmed by a federal appellate court, for a fully redressed economic injury of $269,000. The award was rationalized below largely on the basis of the financial condition of the defendant and conduct not directly at issue in the case below, allegedly involving unidentified other parties, unspecified other jurisdictions, and undefined injury to the United States in the world economy.[6]

2. This Court agreed to review *BMW of North America, Inc.* v. *Gore*, presumably to afford itself the opportunity to articulate meaningful and reliable guidance concerning how excessiveness may be measured and the extent to which a defendant's punishment may be predicated upon factors such as conduct by the defendant that occurred in other cases or other venues. This case presents essentially the same questions as *BMW*, *i.e.*, what makes a punitive damage award constitutionally excessive, and what factors, such as the defendant's wealth, or alleged conduct beyond the scope of the case before the Court, may provide a constitutionally acceptable foundation for a

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[6] Respondents devote much energy restating their version of the "facts" of this case apparently in an effort to convince the Court that petitioner's constitutional claims are unworthy of consideration. OXY rejects categorically respondents' characterizations of the record, but the issue at this stage of the case is not whether OXY committed a wrong, but whether the punishment that has been imposed against it satisfies the Constitution and federal standards of review. As this Court observed in *Honda*, "[w]hat we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." 114 S. Ct. at 2339.

punishment. Like the petitioner in *BMW*, OXY claims that its punishment was excessive. Also, as in *BMW*, OXY was punished for conduct that was extraneous to the dispute between the parties. Respondents -- and the courts below -- have referred to "6,000" other contracts, Opp. at 3, Pet. App. 15a n.14, the particulars of which were not before the court below, and unspecified, intangible damage to the United States in the global economy. Pet. App. 51a. Punishment for such matters, and punishment based on a defendant's wealth, raise important constitutional questions, as the grant of certiorari in *BMW* suggests.

In short, it would make no sense, and would perpetrate an immense injustice, to deny review in this case while the *BMW* case, which is certain to affect the disposition of this case, is pending. *See generally* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.16, at 192-93 (7th ed. 1993).

3. Contrary to respondents' assertion that there is no conflict in the courts of appeals regarding the standards to be applied by federal courts in reviewing the size of punitive damage awards, *see* Opp. at 8-9, 17-20, a substantial conflict exists regarding whether, as a matter of federal due process or under Rule 59 of the Federal Rules of Civil Procedure, comparative analysis of damage awards should be undertaken. The level of confusion and divergence in approach is obvious and the courts of appeals themselves have taken note of it. *See, e.g., Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 579 (1st Cir. 1989) (noting split of authority regarding whether comparative analysis is required). The First, Eighth and Tenth Circuits

do not regularly engage in a comparative review,[7] while other Circuits require such review.[8]

Comparative review of damage awards is all the more important where the controlling law underlying the claim at issue is provided by state rather than federal law. Numerous federal courts have recognized, consistent with the principles of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), that damage awards in federal court cases governed by state law should be compared with awards in state cases to ensure consistency between federal and state court awards. *See, e.g., Raucci* v. *Town of Rotterdam*, 902 F.2d 1050, 1058 (2d Cir. 1990); *Marcel* v. *Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994); *Morrow* v. *Greyhound Lines, Inc.*, 541 F.2d 713, 721-22 (11th Cir. 1976).

Respondents misstate the holdings of the cases requiring a comparative analysis. Contrary to Respondents' argument, the Ninth Circuit, in *Morgan* v. *Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994), *required* district courts to conduct a comparative review. *Id.* at 1257 ("the court should look to awards in

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[7] *See Soto* v. *United States*, 11 F.3d 15, 18 (1st Cir. 1993); *Herold* v. *Burlington N., Inc.*, 761 F.2d 1241, 1248 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985); Pet. App. at 14a, 20a.

[8] *See Holmes* v. *Elgin, Joliet & E. Ry.*, 18 F.3d 1393, 1396 (7th Cir. 1994); *Marcel* v. *Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994); *Gardner* v. *Federated Dep't Stores, Inc.*, 907 F.2d 1348, 1353 (2d Cir. 1990); *Motter* v. *Everest & Jennings, Inc.*, 883 F.2d 1223, 1230-31 (3d Cir. 1989); *Trevino* v. *United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 316 (1987); *Thompson* v. *National R.R. Passenger Corp.*, 621 F.2d 814, 827 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980); *Morrow* v. *Greyhound Lines, Inc.*, 541 F.2d 713, 721-22 (11th Cir. 1976).

similar cases"). The Ninth Circuit based this holding on federal law, not California law, as Respondents suggest. *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir.), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993), is equally misconstrued. The Third Circuit expressly cited this Court's opinion in *Haslip* as the basis for requiring comparative review.

Finally, the Seventh Circuit in *DeRance, Inc.* v. *Paine Webber, Inc.*, 872 F.2d 1312, 1329-30 (7th Cir. 1989), did not apply state law to determine that it should engage in comparative analysis; the authority cited in support of its conclusion, *Levka* v. *City of Chicago*, 748 F.2d 421, 425 (7th Cir. 1984), involved claims under federal law arising in a different State.

These distinctions are significant and outcome determinative in this case. If the Tenth Circuit had compared the award in this case to punitive damage awards permitted by Oklahoma state courts, it would have found that every punitive damage award greater than $2 million presented to an Oklahoma appellate court was reduced by at least fifty percent. *See* Pet. at 18-19. Affirmance by a federal court of an award so disproportionate to state court practice -- without comparative review of the state cases -- is inconsistent with the primacy of state law recognized in *Erie*.

4. Respondents misperceive the second question presented in the petition. This question does not call upon the Court to address the error in the jury instruction that focused on OXY's financial condition. Rather, it squarely presents the issue that troubled several Justices in *TXO*: whether severe punishments against large corporate defendants may be based primarily on the net worth of the defendant. This issue is clearly important, as evidenced by this Court's repeated statements of concern on the subject.

See Honda, 114 S. Ct. at 2340; *Haslip*, 499 U.S. at 22; *TXO*, 113 S. Ct. at 2723.

5. Respondents argue that certiorari should be denied because state or federal legislators "are dealing with" "[the] so-called 'punitive damage crisis.'" Opp. at 12. That would be an inappropriate reason for denying certiorari, especially where the Court has already decided to consider issues that are quite similar, if not identical, to the issues presented by this petition. The possibility, such as it is, that punitive damage abuses may conceivably be addressed at some time in the future by legislation is no basis for denying the victim of this $30,000,000 penalty the benefit of this Court's review of the constitutional issues that this Court has already decided to hear.

6. Respondents' "waiver" arguments are without merit. As the court below explicitly recognized, OXY "strenuously argue[d] that the [punitive damage] award violated both procedural and substantive due process." Pet. App. 11a-12a. OXY expressly raised below -- and the Court of Appeals expressly ruled on -- each of the three questions presented by the petition. Indeed, in a section of its opinion entitled **"Substantive Due Process/Excessiveness,"** the court, relying on its interpretation of *Haslip* and *TXO*, concluded that the $30,000,000 punitive damage award was not so excessive as to violate due process. Pet. App. 18a-22a.

The court below also specifically ruled that its "shock-the-conscience" standard of review of punitive damages "satisfies constitutional standards," *id.* 19a, and rejected OXY's argument that federal judicial review of punitive damage verdicts must include a comparative analysis. *See, e.g., id.* 14a ("OXY argues that the district court's review here was inadequate in that it should have compared the award in this case with awards in similar cases. . . . [W]e

will not require a district court to set out a comparative analysis . . . ."); *see also id.* 20a ("[W]e would exceed our scope of review if we required symmetry in the manner OXY suggests."). And the Court of Appeals likewise rejected OXY's argument that the punishment here violated due process because it was based predominantly on OXY's wealth rather than its conduct. *See, e.g., id.* 14a (rejecting OXY's argument that "the district court made no effort to articulate a basis for the award other than wealth"); *id.* 19a (rejecting OXY's argument that due process was violated because "plaintiffs' closing argument was inflammatory on the issue of OXY's wealth").

Given the Court of Appeals' express rulings on each of the questions raised in the petition, they are indisputably properly presented for this Court's review. "There can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980) (because the court below decided the constitutional issue, "there is no doubt that it is properly presented for review by this Court").

* * * *

While many punitive damage issues are the same in state and federal courts, federal court review of punitive damage awards presents different questions than those faced in state courts, and this Court has a special responsibility to ensure that the federal courts are doing their job fairly and responsibly. Since the issues presented by this case are similar to those involved in *BMW*, but present themselves in the context of a federal court proceeding, this case should be accepted for review or, at minimum, held for a decision concerning review until resolution of *BMW*.

Dated: June 9, 1995

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner OXY USA Inc. ("OXY") respectfully submits this supplemental brief in support of its petition for a writ of certiorari to bring to the Court's attention a recent opinion, *Pulla* v. *Amoco Oil Co.*, Nos. 94-4001, 95-1047, ___ F.3d ___, 1995 WL 747259 (8th Cir. Dec. 19, 1995). In *Pulla* an Eighth Circuit panel that included retired Justice Byron White, sitting by designation, held that a $500,000 punitive damage award imposed against Amoco Oil Company was "unreasonable and violates Amoco's substantive due process rights." 1995 WL 747259, at *8. Among other things, the Eighth Circuit in *Pulla* adopted a constitutional excessiveness standard based upon the "potential harm" analysis in *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), that is inconsistent with the standard applied by the Tenth Circuit in this case and thus further expands the conflict in the circuits on this issue.

The plaintiff in *Pulla*, a former Amoco employee, had recovered the $500,000 punitive damage award on a claim that his privacy had been invaded when his credit card records were searched by one of the plaintiff's coworkers to determine if the plaintiff had abused his sick leave. *See* 1995 WL 747259, at *1-*2. The district court had upheld the award, "reasoning that '[w]ere Amoco or others similarly situated to be undeterred from intruding on the privacy of employees' credit cards to check up on their use of sick leave or for any other purpose, the aggregate invasion of privacy into sensitive matters would be enormous indeed.'" *Id.* (quoting *Pulla* v. *Amoco Oil Co.*, 882 F. Supp. 836, 887 (S.D. Iowa 1994)).

In an opinion written by retired Justice White, the Eighth Circuit determined that the district court had "erred

by misconceiving the nature of potential harm" in reviewing the punitive damage award for excessiveness under the Due Process Clause. *Id.* According to the Eighth Circuit, "the potential damages must be evaluated in light of a defendant's actual conduct." *Id.* "Under this standard, the touchstone is the potential harm that would have likely resulted from the dangerousness inherent in [the] defendant's actual conduct," and "a court may not justify the award of punitive damages in a particular case by overlooking the actual events and focusing on potential victims of similar *hypothetical* torts." *Id.* (emphasis in original).

In *Pulla,* "the district court focused on the hypothetical result of future such actions, and did not pinpoint any evidence connected to the actual search of [the employee's] credit card records." *Id.* The Eighth Circuit determined that the district court's "approach to analyzing punitive damages departed from *TXO* in that it did not require that the potential harm was likely to occur." *Id.* The Eighth Circuit concluded that the extreme ratio of punitive to actual damages (250,000 to 1) required a clear showing of the "likelihood and amount of potential damages," *id.* at *10, and that there was no such showing in that case.

The Eighth Circuit's analysis in *Pulla* conflicts with the reasoning of the Tenth Circuit in this case. Citing "evidence of 6,000 contracts" between OXY and other producers, Pet. App. 15a n.14, the Tenth Circuit justified the $30,000,000 punitive damage award imposed against OXY, in part, on "the *potential* widespread injury to large numbers of independent producers if OXY continued interfering with contracts." Pet. App. 17a (emphasis in original). There was no evidence that OXY engaged in any wrongdoing whatsoever concerning these other producers and the 6,000 contracts. Thus, in focusing on the

"hypothetical result" of OXY's future actions, the Tenth Circuit "did not pinpoint any evidence" connecting the theoretical potential harm to the actual events in this case, as required by *Pulla*. *Cf. Pulla*, 1995 WL 747259, at *9.

The Tenth Circuit also rationalized the punitive damage award as "an example to deter others from suppressing free enterprise," Pet. App. 15a, echoing the district court's assertion that the award was warranted because OXY's conduct "incrementally damages the United States in its present struggle to remain a global economic power," Pet. App. 51a. Yet, the Tenth Circuit made no attempt to explain how these harms to "free enterprise" and the American economy were "likely to occur" in light of OXY's *actual* conduct in this case, which resulted in $269,000 in actual damages, an amount 1/111th the size of the $30,000,000 punitive damage award. *Cf. Pulla*, 1995 WL 747259, at *9. Again, the Tenth Circuit's speculation regarding potential harm has no basis in the record and is flatly inconsistent with the standard for constitutional excessiveness review applied by the Eighth Circuit in *Pulla*. The Tenth Circuit simply did not and could not make a finding of the "likelihood and amount of potential damages" as required by *Pulla* to justify the very high ratio of punitive to actual damages in this case.

The decision below also conflicts with *Pulla* by emphasizing OXY's wealth as a justification for the size of the punitive damage award. The Eighth Circuit observed that "[w]hile a defendant's wealth may be taken into account in order to ensure that an award will adequately deter any future such conduct, a defendant's wealth cannot alone justify a large punitive damages award." *Id.* at *8 n.16. Here, however, the size of the punitive damage award can *only* be explained by OXY's status as a wealthy corporation. *See* Pet. 19-30. In fact, both the district court

and the Tenth Circuit stressed OXY's financial condition in rationalizing the amount of punitive damages awarded. *See* Pet. App. 20a-21a, 56a, 63a. According to the Tenth Circuit, the $30,000,000 punitive damage award "is not necessarily a shocking figure" when "examined from the perspective of what is necessary to punish a very wealthy corporation." *Id.* 21a. Indeed, the Tenth Circuit even justified the $30,000,000 award by relying—without any evidence—on the purported need to "deter . . . other similarly situated [wealthy corporations] from like behavior." *Id.* Such undue emphasis on the wealth of the defendant—and on other hypothetical wealthy defendants—is not permitted under the constitutional excessiveness standard applied by the Eighth Circuit in *Pulla*.

Pulla thus brings into sharp focus the conflict in the circuits discussed in OXY's petition and reply memorandum regarding the proper standards to be applied by federal courts in reviewing punitive damage awards for excessiveness, and further demonstrates the need for the Court to grant certiorari in this case.

Dated: January 17, 1996

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Supreme Court, U.S.
FILED
FEB - 8 1996
CLERK

No. 94-1838

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

OXY USA INC.,

Petitioner,

V.

CONTINENTAL TREND RESOURCES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

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Rules:

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On January 17, 1996, Petitioner OXY USA Inc. ("OXY") submitted a Supplemental Brief to bring to the Court's attention the recent opinion of *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995). Pursuant to Supreme Court Rule 15.8, Respondents Continental Trend Resources, Inc.; Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright; Cindy Wright; Jeffrey B. Hume; and Farrar Oil Company (collectively "Continental"), respectfully submit this Supplemental Brief in support of its Brief in Opposition to Petition for Writ of Certiorari to address the *Pulla* decision.

OXY cites *Pulla* as bringing into "sharp focus" the supposed conflict in the circuits regarding the proper standards to be applied by federal courts in reviewing punitive damage awards for excessiveness. (Petitioner's Supplemental Brief, p. 4.) In *Pulla*, however, retired Justice White, writing for the panel, squarely rejected OXY's primary argument in its Petition for Certiorari that the federal Constitution requires a reviewing court to undertake a comparative analysis of awards in determining whether a particular punitive damage award is excessive. *Pulla*, 72 F.3d at 658-59. Instead, the *Pulla* court applied the same reasonableness test set forth in *TXO Production Corp. v. Alliance Resources Corp.*, __ U.S. __, 113 S.Ct. 2711 (1993) and requested by Petitioners and utilized by the Tenth Circuit in this case. *Compare Pulla*, 72 F.3d at 658-59 with the Tenth Circuit decision. Pet. App. 15a-22a.

In *Pulla*, the Eight Circuit reversed a punitive damage award of $500,000 where the actual damages were $2 and (1) the subject misconduct (the invasion of privacy to the plaintiff) was an isolated act, (2) there was no evidence that any other individual's privacy was at risk, (3) there was no

evidence rebutting Amoco's assertion that the event was an isolated and rare incident, (4) there was no company policy involved, and (5) the bad actors were low level company employees who had acted without the knowledge of their superiors. *Pulla*, 72 F.3d at 658-61. The *Pulla* court emphasized that the facts before it were in "stark contrast" to the facts in *TXO* and thus, given the limited offensiveness of Amoco's actions and the unlikelihood of any serious potential harm from its conduct, the 250,000 to 1 ratio between actual and punitive damages was excessive. *Pulla*, 72 F.3d at 660-61.

The facts in *Pulla* also stand in stark contrast to the facts in this case. Here, both the district court and the Tenth Circuit relied on a record that included a pattern of overt instances of egregious misconduct directed at both Respondents and other producers. *See* Respondents' Brief, pp. 2-3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-53a. This evidence included such misconduct as shutting in other producers' wells to prevent them from selling gas in the free market; falsifying and altering documents; fraud; devising an overall "plan" to prevent Continental and other producers from selling their gas in the free market; impermissibly charging all producers for millions of dollars of gathering fees not allowed under the OXY contracts; asserting sham contract rights; and direct testimony from OXY admitting that its conduct was intended to deter all producers from selling gas in the free market. *Id.* As the Tenth Circuit noted:

> The district court also observed that the jury was "visibly reactive to" the testimony of OXY's corporate representative that "'we cannot let [plaintiffs] get away with this or everybody else will try to do it [bypass Rodman].

> It was a 'the natives are restless, we better get out there and subdue them' kind [of] presentation."

Pet. App. 21a. Thus, unlike *Pulla*, OXY's misconduct involved the implementation of a plan directed at over 6,000 contracts with admissions from OXY that its misconduct was calculated to (1) make money, and (2) interfere with the other 6,000 contracting parties' rights to sell a scarce natural commodity -- natural gas -- in the free market.[1] Here, "the potential damages evaluated in light of defendant's actual conduct" was not predicated on similar "hypothetical torts" but rather evidence of actual widespread misconduct coupled with admissions by corporate representatives that the conduct was directed at thousands of producers.

The *Pulla* court was also troubled by the rare and isolated nature of Amoco's conduct. *Pulla*, 72 F.3d at 660. As the *Pulla* court observed:

> In the instant case, there is no evidence or indication that Wieczorek's conduct reflected a company policy or practice as was the case in *TXO*. In contrast, in *TXO*, the plaintiff presented evidence that TXO deliberately engaged in this wrongful conduct, and that prior lawsuits had been filed against it for similar misdeeds. [*Citations omitted.*] Simi-

---

[1] One OXY's corporate representative specifically testified that the conduct was directed to at least "500 or so" contracts. Pet. App. 52a. Other OXY witnesses and OXY's counsel referred to 6,000 contracts. Pet. App. 15a.

> larly, we would view Amoco's conduct in a more critical light if Pulla had presented any evidence rebutting Amoco's assertion that this was an isolated and rare incident.

In this case, contrary to *Pulla*, both the district court and the Tenth Circuit were faced with a record showing that OXY's top level executives engaged in a deliberate plan of trickery and deception orchestrated by its legal department, together with findings that OXY's conduct was reprehensible, malicious and fraudulent. *See* Respondents' Brief, pp. 2-3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-53a. This pattern of misconduct was not a "rare and isolated" incident; rather, it occurred over a period of several years involving thousands of contracts. *Id.*; Pet. App. 15a.

Thus, unlike *Pulla*, this case presents a classic case of punitive damages bearing a reasonable relationship to the harm that actually occurred when reviewed in light of the legal standards that this Court, the *Pulla* court and the Tenth Circuit have found should be applied in a substantive due process review. *See TXO*, 113 S.Ct. at 2721-23 (plurality opinion), 113 S.Ct. at 2726 (Kennedy, J., concurring); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-20 (1991); *Pulla*, 72 F.3d at 659-61; Pet. App. 12a-22a.

The *Pulla* case thus presents yet another example of how two different circuits can apply the same legal standards in the same manner and reach different results because the awards were imposed under different circumstances, against different defendants, and with very <u>different facts</u>. This Court has never held that the Constitution prohibits large damage awards. As the *Pulla* court observed, the focus of the reviewing court is to ensure that, under the circumstances

of the particular case, the award is not grossly excessive or unreasonable. 72 F.3d at 658-59.

The decision below is also consistent with the Eighth Circuit's observations that this Court has viewed wealth as an appropriate factor to ensure that an award will adequately deter any future misconduct. 72 F.3d at 658-59. OXY's argument that the size of the punitive damage award in this case can only be explained by OXY's status as a wealthy corporation is remarkable. It ignores the overwhelming record evidence and findings of the jury, district court and Tenth Circuit of OXY's intentional pattern of tortious misconduct. This case involves the kind of deliberate, evil-minded wrongdoing that has given rise to punitive damages in this country since its founding. The enormous amount of evidence of OXY's pattern of trickery and deception shows that a punitive damage award of less than 1% of OXY's net worth and less than one week of revenue falls well within the parameters of this Court's "reasonableness analysis."

Pulla, therefore, further establishes that the various federal courts of appeals' review process is consistent and uncontroversial. As such, the *Pulla* case stands in "stark contrast" to OXY's contention that there is a conflict in the circuits regarding whether the reviewing courts of appeals must apply a "comparative analysis," and further demonstrates that there is no basis to grant certiorari in this case.

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Dated: February 8, 1996

SUPREME COURT
FILED
MAY 21 1996
CLERK

No. 94-1838

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October Term 1994

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

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Pursuant to Supreme Court Rule 15.8, Respondents Continental Trend Resources, Inc.; Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright; Cindy Wright; Jeffrey B. Hume; and Farrar Oil Company (collectively "Continental"), respectfully submit this Second Supplemental Brief in opposition to the Petition for Writ of Certiorari of OXY USA Inc. ("OXY") to address the effect of the Court's decision in *BMW of North America, Inc. v. Gore*, __ U.S. __, 1996 WL 262429 (May 20, 1996). Continental respectfully submits that this Court's holding in *BMW* demonstrates there is no need nor basis to grant certiorari in this case. *BMW* did not involve the type of reprehensible, fraudulent, intentionally tortious conduct present here. As the Court observed in *BMW*, punitive damages are properly awarded, and in significant amounts, in cases of intentional tort, affirmative fraudulent acts and deceit, conversion and affirmative fraudulent trade practices. *BMW*, 1996 WL 262429 at *8-*10. *See also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (Kennedy, J., concurring). For the reasons set forth herein, Continental respectfully submits that the decision in *BMW* mandates the denial of OXY's Petition for Writ of Certiorari.

I.

THE *BMW* CASE DOES NOT CHANGE THE PROCEDURAL DEFICIENCIES CONTAINED IN OXY'S PETITION

As Continental demonstrated in its Brief in Opposition to Petition for Writ of Certiorari, the questions presented by OXY's Petition were not raised and/or were waived in the proceedings below. *See* Brief in Opposition to Petition for Writ of Certiorari, pp. 1, 5-7. As such, this Court's decision

in *BMW* has no impact on many, if not all, of OXY's arguments. On the only question arguably preserved -- whether the verdict is excessive under the unique facts of this case -- *BMW* makes clear that the decision below was plainly correct, the appropriate guideposts were applied, and the right result was reached.

II.

THE TENTH CIRCUIT AND THE DISTRICT COURT PREVIOUSLY APPLIED THE IDENTICAL GUIDEPOSTS IDENTIFIED IN *BMW* IN REACHING THE RIGHT RESULT

This Court in *BMW* reaffirmed its prior decision in *TXO* that a punitive damage award violates the due process clause of the United States Constitution only when it can fairly be categorized as "grossly excessive" in relation to the state's legitimate interests in punishing unlawful conduct and deterring its repetition. 1996 WL 262429 at *6-*8; *see also TXO*, 509 U.S. at 456. The determination of whether an award is "grossly excessive" in light of a state's legitimate interests of punishment and deterrence of intentional wrongdoing occurring within its borders is reviewed in part by the application of "three guideposts." 1996 WL 262429 at *8. These guideposts include the degree of reprehensibility of the defendant's conduct; the disparity or lack thereof between the harm or potential harm suffered by the plaintiff and the punitive damage award; and the difference between the punitive damage award and sanctions for comparable misconduct (*i.e.*, civil or criminal penalties that could be imposed). *Id.*

Here, the United States Court of Appeals for the Tenth Circuit and the district court have already carefully

placed the facts of this case under the microscope of these three guideposts (and others previously identified by this Court in *TXO* and *Haslip*[1]) in determining that the award was well within the parameters of constitutional reasonableness.

For example, Oklahoma, unlike Alabama, had a "cap" on punitive damages which could be lifted only where a trial court found by clear and convincing evidence that the defendant's conduct was reprehensible and evinced oppression, wanton and intentional disregard for a plaintiff's rights. The district court made such a finding in this case. (Pet. App. 41a-44a). The trial court then conducted an exhaustive 18 month post-trial review of the verdict applying the identical guideposts identified by this Court in *BMW* and resulting in express findings of the type of reprehensibility which this Court identified in *BMW* as supporting a substantial punitive award. (*Compare* Pet. App. 33a-63a with *BMW*, 1996 WL 262429 at *8-*10.) Notably, OXY has not challenged the finding of clear and convincing evidence to lift the cap. The Tenth Circuit also applied the relevant guideposts and found "several factors that support the extremely large punitive damage award." (Pet. App. 21a.) The Tenth Circuit specifically identified multiple instances of the reprehensibility of OXY's conduct (*compare* 1996 WL 262429 at *8-*10 with Pet. App. 11a, 14a-22a); compared the harm and potential harm suffered by Continental (coupled with the profit incentive of OXY) with the punitive award (*compare* 1996 WL 262429 at *10-*11 with Pet. App. 15a-22a); and focused on the difference between the punitive remedy and sanctions for comparable misconduct (*compare* 1996 WL 262429 at *11-*12 with Pet. App. 19a.)

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[1] *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Thus, by utilizing the same guideposts identified by this Court in the *BMW* case (and as further identified in *TXO* and *Haslip*), the Tenth Circuit applied "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" (*BMW*, 1996 WL 262429 at *8) and found that OXY's intentional, reprehensible conduct warranted a substantial penalty. Because the lower courts have already applied the constitutional principles held by this Court in *BMW*, *TXO* and *Haslip* to be relevant, and because the facts in this case amply support the lower court's decision, there is no basis to grant certiorari or for the Tenth Circuit to reconsider its opinion in light of *BMW*.

III.

APPLICATION OF THE THREE GUIDEPOSTS DEMONSTRATES THAT THERE IS NO REASON TO GRANT CERTIORARI

A. DEGREE OF REPREHENSIBILITY

In *BMW*, this Court stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 1996 WL 262429 at *8. The Court explained that "trickery and deceit," *see also TXO*, 509 U.S. at 462, are, for example, more reprehensible than negligence, 1996 WL 262429 at *8; and that conduct evidencing intentional malice, intentional economic injury caused through affirmative acts of misconduct, or intentional acts of misconduct when the target is financially vulnerable all warrant a substantial penalty. *See* 1996 WL 262429 at *8. The Court cited other factors such as repeated engagement in prohibited conduct, deliberate false statements, acts of affirmative

misconduct, and concealment of evidence or improper motive as being material factors supporting a substantial punitive damage award. *See* 1996 WL 262429 at *8-*10.

Focused on these considerations, *BMW* stands in stark contrast to the facts in this case. Unlike *BMW*, all of the factors identified by this Court as being relevant to support the constitutional validity of a large punitive damage award are present. Here, OXY's misconduct meets all of the indicia of reprehensibility. Both the district court and the Tenth Circuit relied on a record that included a deliberate pattern of overt and affirmative instances of egregious misconduct directed at both Continental and other victims. *See* Respondents' Brief, pp. 2, 3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-57a. OXY repeatedly used trickery, deceit and affirmative acts of fraud in conducting its plan for profit. *Id.* OXY's misconduct was lengthy in duration. *Id.* OXY's upper management and attorneys orchestrated the misconduct and were aware of the harm that the conduct caused and was likely to cause. *Id.* OXY knowingly testified falsely at depositions and falsified and altered documents in an attempt to conceal its motive and wrongdoing. *Id.*

The record is replete with evidence of OXY's reprehensible misconduct. It included shutting in other producers' wells to prevent them from selling gas in the free market; repeated acts of fraud on both Continental and on third parties; devising an overall "plan" to prevent Continental and other producers from selling their gas in the free market; intentionally breaching contracts by impermissibly charging Continental and other producers millions of dollars in gathering fees not allowed under the subject contracts; asserting sham contract rights; falsifying and altering documents to cover up OXY's liability; lying to third parties;

attempting to steal Continental's gas without paying for it to induce Continental to change its position; and filing sham lawsuits against third parties who tried to do business with Continental.

Thus, unlike the facts in *BMW*, the Tenth Circuit observed that in this case there was "voluminous evidence that OXY engaged in oppressive and coercive behavior that interfered with plaintiffs' present and prospective contracts; the consequences of such unchecked behavior could be disastrous." (Pet. App. 21a-22a.)

. Similarly, in this case, contrary to the facts in *BMW*, both the district court and the Tenth Circuit expressly relied on a record showing that OXY's top level executives engaged in a deliberate plan of trickery and deception, orchestrated by its legal department, together with findings that OXY's conduct was reprehensible, malicious and fraudulent. *See* Respondents' Brief, pp. 2-3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-53a. Unlike *BMW*, the pattern of misconduct here was not rare or isolated, but rather occurred over a period of several years involving literally thousands of contracts and hundreds of producers.

B. RELATIONSHIP OF ACTUAL AND POTENTIAL HARM TO PUNITIVE DAMAGES

The second indicium cited by this Court in *BMW* in the constitutional calculus is the inquiry concerning the reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred. 1996 WL 262429 at *10-*11; *see also TXO*, 509 U.S. at 460; *Haslip*, 499 U.S. at 21. In *BMW*, the Court specifically contrasted

the holding in *TXO* -- wherein it relied on the difference between the $10 million award and the harm to the victim that would have ensued if the tortious plan had succeeded, making the relevant ratio not more than 10 to 1 -- to the facts in *BMW* where the award by the Alabama Supreme Court of $2 million in punitive damages to Dr. Gore was 500 times the amount of actual harm as determined by the jury with no "additional potential harm by BMW's nondisclosure policy." 1996 WL 262429 at *10-*11. The Court found that the disparity [in *BMW*] is "thus dramatically greater than those considered in *Haslip* and *TXO*." 1996 WL 262429 at *11. Emphasizing that there is no mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable, the Court reaffirmed its prior holdings in *Haslip* and *TXO* that a general concern of reasonableness enters into the constitutional calculus. 1996 WL 262429 at *11. The fact that the 500 to 1 ratio in *BMW* "raise[d] a suspicious judicial eyebrow," 1996 WL 262429 at *11, *see also TXO*, 509 U.S. at 482 (O'Connor, J., dissenting), coupled with the lack of reprehensibility of BMW's conduct made the award in *BMW* grossly excessive.

Here, however, the actual and potential harm coupled with OXY's profit incentive was huge. OXY tendered evidence that there were literally hundreds of producers and up to 6,000 contracts involved in its recidivist scheme. (Resp. App. 2a, ¶ 12, Pet. App. 15a.) The record here, like that in *TXO*, shows specific evidence of OXY's wrongdoing to others. The Tenth Circuit found (as in *TXO*) that OXY's tortious conduct directed towards Continental was but a part of pattern, practice and plan of deception and intentional wrongdoing. The record evidenced a situation where Continental was financially vulnerable. OXY's actions not only pushed Continental's business to the verge of collapse, but if

OXY's plan had been ultimately successful, Continental would have lost its business and been harmed by literally millions of dollars.

The record also showed that prior to trial, OXY argued it had been damaged by over $7 million just by the small amount of gas Continental had been able to take off the Redman System which, if OXY's plan had been successful, would have been a direct loss to Continental. At trial and on its motion for new trial, OXY continued to assert that its damages were at least $4.25 million. Further, by preventing other gas from going to the free market, OXY's profit incentive was large indeed. As the Tenth Circuit noted, the 6,000 contracts involved also supported the conclusion that there was potential widespread injury and illicit profit. (Pet. App. 19a-20a.)[2] As part of its profit incentive, OXY also impermissibly charged "gathering fees" on some of these contracts ranging anywhere from 7¢ to 29¢ per Mcf for a period of over 5 years.

Thus, like *TXO*, the ratio here between actual and potential harm, coupled with the profit incentive to the punitive award, was actually less than 10 to 1. Such a ratio -- especially when viewed in the context of the reprehensible conduct of OXY -- represents a "reasonable relationship" between the punitive damage award and the actual and potential harm involved.

---

[2] Unlike the facts in *BMW*, there is no evidence in the record that OXY's misconduct against other producers involved states other than Oklahoma. Further, the Court reiterated in *BMW* that other misconduct is relevant in determining the degree of reprehensibility involved. 1996 WL 262429 at *7 n.21.

C. SANCTIONS FOR COMPARABLE MISCONDUCT

A third indicia cited by this Court in *BMW* is sanctions for comparable misconduct. 1996 WL 262429 at *11. Continental has previously shown that the Federal Organizational Sentencing Guidelines exact similar penalties for conduct causing only economic harm which take into account the seriousness of the offense, the culpability of the organization, the necessity to remedy the harm caused, the pecuniary gain to the organization, the pecuniary loss from the offense, the size of the organization and the level of management involved. *See* 18 U.S.C. Appx. § 8 *et seq*. Under these factors and taking into account the amount of money involved and the other facts identified in Continental's Brief in Opposition, OXY's multiple offenses could have conservatively generated tens of millions of dollars in fines. Further, the Tenth Circuit compared this award to similar cases of intentional wrongdoing and found that under like circumstances, substantial verdicts have been entered and approved. (Pet. App. 19a-20a).

CONCLUSION

In *BMW*, this Court reiterated that it is not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damage award. 1996 WL 262429 at *13. The majority opinion found, however, that unlike the facts in *TXO* and *Haslip*, it was fully convinced that "the grossly excessive award imposed in this case transcends the constitutional limit." *Id.*

In contrast to *BMW*, this case has previously been reviewed under the pertinent guideposts and contains all of

the indicia identified as relevant by this Court to support a large punitive damage award. The Tenth Circuit has previously applied the relevant guideposts and found the existence of the types of reprehensible conduct identified in *BMW* as being necessary to impose a substantial punitive damage award. Therefore, this Court's decision in *BMW* demonstrates that there is no basis to grant OXY's Petition for Certiorari or to remand this case for reconsideration in light of *BMW*, and Respondents respectfully submit that the Petition be denied.

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Dated: May 22, 1996

Supreme Court, U.S.
FILED
MAY 23 1996
CLERK

No. 94-1838

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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OXY USA INC.'S RESPONSE TO CONTINENTAL TREND RESOURCES, INC.'S SECOND SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioner OXY USA Inc.[1] ("OXY") respectfully submits its Response to the Second Supplemental Brief of Respondents Continental Trend Resources, Inc., *et al.* (collectively "CTR"), filed May 22, 1996. OXY's petition for certiorari presented a question virtually identical to that presented in *BMW of N. Am., Inc. v. Gore*, ___U.S. ___, No. 94-896 (U.S. May 20, 1996), which the Court decided on May 20. There is no question that the standards enunciated by this Court in *BMW* must be applied in this case as well. In its petition for certiorari, OXY urged this Court either to grant its petition or, in the alternative, to retain the case on its docket and dispose of the matter appropriately in light of the decision in *BMW*. Pet. at 30.

CTR's current brief is an argument on the merits concerning the application of the *BMW* decision to the facts of this case.[2] Such an argument is, of course, wholly inappropriate in the context of a petition for certiorari. OXY's petition pre-

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[1] The parent companies of OXY USA Inc. are Occidental Oil and Gas Corporation, Occidental Petroleum Investment Company, and Occidental Petroleum Corporation. OXY USA Inc. owns minority interests in Canadian Occidental Petroleum, Ltd., Industrias OXY, S.A. de C.V., and East Texas Salt Water Disposal Company. All other companies in which OXY USA Inc. owns an interest are wholly-owned subsidiaries.

[2] Respondents also repeat their erroneous argument that OXY has waived certain of its questions presented. Second Supp. Br. at 1-2. That argument has nothing to do with the decision in *BMW* and is beyond the scope of a proper supplemental brief. *See* Rule 15.8 In any event, OXY has already responded to this argument in its Reply Memorandum. *See* Reply at 8-9.

sented the question whether the Tenth Circuit applied the proper constitutional standard in reviewing a punitive damages award for excessiveness. Pet. at i. The *BMW* decision demonstrates that the Tenth Circuit did not. Unless this Court grants certiorari for plenary review of this case, it should follow its traditional practice of granting the petition, vacating the judgment, and remanding to the Tenth Circuit for application of the proper analysis under *BMW*.

1. Contrary to CTR's argument, the Tenth Circuit most certainly did not apply the constitutional analysis articulated in *BMW*. The Tenth Circuit applied "shocks the conscience" review to test the constitutionality of the $30,000,000 award. Pet. 18a. By contrast, this Court explained in *BMW* that proper constitutional review of punitive damages awards should focus on three factors: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive award to compensatory damages; and (3) a comparison to civil and criminal penalties that might be imposed for comparable misconduct. In addition, a reviewing court must consider "whether less drastic remedies could be expected to achieve th[e] goal" of deterrence of future misconduct. *BMW*, slip op. at 25. The Tenth Circuit did not apply these factors.

With respect to the first guidepost — the degree of reprehensibility — this Court held in *BMW* that there is a distinction between acts that cause harm that is "purely economic in nature" and acts that evince "indifference to or reckless disregard for the health and safety of others." *Id.* at 16. The damage in this case is solely economic. In contrast to this Court's analysis in *BMW*, the Tenth Circuit expressly rejected the argument that it should consider OXY's conduct less culpable because it caused only economic harm rather than harm to health or safety. Pet. 19a.

In *BMW* this Court identified the ratio between punitive and compensatory damages as the second guidepost in judg-

ing the excessiveness of punitive damages. In doing so, it held that punitive damages "must bear a 'reasonable relationship' to compensatory damages . . . ." *BMW*, slip op. at 20. In this case the ratio between the punitive award and compensatory damages was 111:1. Far from considering this ratio as a relevant factor, the Tenth Circuit apparently believed that the plurality opinion in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), had rendered such high ratios irrelevant, and the court of appeals dismissed the huge disparity in this case as a factor. Pet. 19a-20a.

The Tenth Circuit's opinion below failed altogether to address this Court's third guidepost requiring that the punitive award be compared to analogous civil and criminal fines.

In addition, the court of appeals concluded that $30,000,000 is "not necessarily a shocking figure" in relation to what is necessary to punish a wealthy corporation. Pet. 21a. However, it failed to consider whether a less drastic remedy could be expected to achieve the same goal, as is required by *BMW*. *See BMW*, slip op. at 25.

Nor did the Tenth Circuit address another central question under *BMW*: whether OXY was being punished in part for conduct aimed at consumers outside the State of Oklahoma. The trial court justified the award on the ground that "OXY's conduct incrementally damages the United States in its present struggle to remain a global economic power," and the Tenth Circuit cited this statement with approval in upholding the award. Pet. 15a. Moreover, it justified the award based on the alleged effect of OXY's actions on 6,000 gas producers connected to OXY's multi-state operations. *Id.*

In short, it is quite clear that the Tenth Circuit did not consider this case under the standards established by *BMW*.

2. CTR argues at considerable length that this Court should take upon itself the task of applying the principles of

BMW to the record in this case. Such an action would be appropriate, however, only after the parties have briefed and argued the merits on plenary consideration. The appropriate procedure, in the event this Court does not grant certiorari for plenary consideration, is to grant certiorari, vacate and remand to the Tenth Circuit.[3]

The action urged by CTR would deprive OXY of review under the constitutionally-based standards enunciated by this Court in *BMW*. Such a decision should not be made on the basis of the abbreviated record presented in a petition for certiorari or, even less, on the basis of gross misrepresentations about the record made in an eleventh-hour supplemental brief. Such issues are worthy of plenary consideration under the principles enunciated in *BMW* — if not by this Court, then by the Tenth Circuit.

3. OXY's petition also presents at least one additional question separate from the *BMW* decision: whether a $30,000,000 punitive damages award predicated primarily on the wealth of the defendant is constitutionally excessive. *See* Pet. at i, 19-30. The *BMW* decision did not address the relevance of the defendant's financial condition in constitutional

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[3] As the Court has recently noted:

> [A] GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary jurisdiction, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Lawrence ex rel. Lawrence v. Chater, 116 S. Ct. 604, 606-07 (1996) (alterations and internal quotation marks omitted).

review. This case presents an ideal vehicle for such further clarification following *BMW*.

In conclusion, this Court should either grant the petition and set this case for plenary review or remand the case to the Tenth Circuit for reconsideration under the principles of *BMW*.

Respectfully submitted,

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Dated: May 23, 1996